

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Original

76-1212

**United States Court of Appeals
For the Second Circuit**

THE UNITED STATES OF AMERICA,

Appellee,

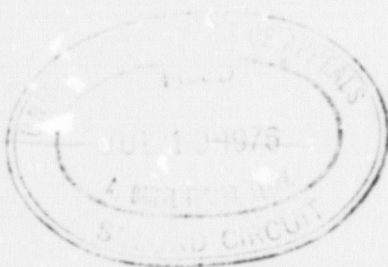
-against-

ARMANDO ESPARZA, DELFIN "LEO"
GONZALEZ, HECTOR CHRISTIAN,

Appellants.

*Appeal From The United States District Court
For The Eastern District Of New York*

Appellants' Appendix



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

ARMANDO ESPARZA,
JOHN DOE, also known as
"Leo Gonzalez", and
HECTOR CHRISTIAN,

Defendants.

----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 16th day of May, 1975
and the 31st day of May, 1975, both dates being approximate
and inclusive, within the Eastern District of New York, the
defendants ARMANDO ESPARZA, JOHN DOE, also known as "Leo
Gonzalez" and HECTOR CHRISTIAN did knowingly, wilfully and
unlawfully combine, conspire, confederate and agree together
and with each other to knowingly and intentionally distribute
a quantity of cocaine, a Schedule II narcotic drug controlled
substance in violation of Section 841(a)(1) of Title 21, United
States Code. (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 29th day of May, 1975, within the
Eastern District of New York, the defendants ARMANDO ESPARZA
and JOHN DOE, also known as, "Leo Gonzalez", did knowingly and
intentionally possess with intent to distribute approximately
115 grams of cocaine, a Schedule II narcotic drug controlled
substance. (Title 21, United States Code, §841(a)(1) and
Title 18, United States Code, §2)

COUNT THREE

On or about the 29th day of May, 1975, within the Eastern District of New York, the defendants ARMANDO ESPAFZA and JOHN DOE, also known as, "Leo Gonzalez", did knowingly and intentionally distribute approximately 115 grams of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, 5841(a)(1) and Title 18, United States Code 52).

A TRUE BILL

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

DISTRICT COURT - CRIMINAL DOCKET
JUDGE/Assigned Trial
MAGISTRATE 12

U.S. vs.

75 CR 772-1

ARMANDO ESPARZA

U.S. CODE SECTION:
21:846
21:841(a)(1)

Did conspire to distribute cocaine
Did possess w/intent to distribute cocaine

CLOSED

U.S. Attorney or Asst.
Carol Amon

Schulman and Laifer-16 Court Street
Brooklyn, N.Y. 11241 UL5-8855

ARREST

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

J.S. Custody
Illeg on Above
Charges

High Risk
Defn. &
Date Design'd

10/21/75
Information
Waived
Superseding
Indict/Info

10/23/75
1st Plea
II
Final Plea

Trial Set For
1/19/76
Not Guilty
Nolo
Guilty
Not Guilty
Nolo
Guilty

Voir Dire
2/23/76
Trial Began
2/23/76
Trial Ended
2/27/76

Disposition
Convicted
Acquitted
Dismissed
Nolo/Discontinued
On A/C
On Lease
Offense/I
WOP

Prosecution Deferred

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		Dismissed
Summons	Issued			Date Scheduled		Held for District CJ
	Served			Date Held		Held to Answer to U.S. District Court
Arrest Warrant				Waived	Intervening	AT
				Not Waived	Indictment	Magistrate's Initials
COMPLAINT				Tape No	INITIAL/No.	
OFFENSE (In Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information.

John Doe-2, Hector Christian-3

DATE	PROCEEDINGS
10/21/75	Before NEAHER, J.- Indictment filed- bench warrant ordered and issued
10/22/75	Before MISHLER, CH.J.- Case called- Deft and counsel not present- deft arraigned and enters a plea of not guilty- bail set at \$25,000.00 surety Bond- Trial set for 1/19/76 and Notice of appearance filed
10/23/75	Govts Notice of Readiness for Trial filed.
10-29-75	
11-19-75	Before COSTANTINO J - case called - motion by deft for reduction of bail argued - bail reduced to \$15,000 surety company bond or the equivalent.
12-10-75	Before MISHLER, CH J - case called - on application by counsel for the deft, a Master Hernandez to sign a \$15,000 P/R Bond also his business property to be placed as security - deft to be released on bail only upon the order of the Court as indicated on the record.
12/29/75	Notice of motion for bill of particulars filed ret/ 1/9/75
1-9-76	Before MISHLER, CH J - case called - motion for Bill of Particulars argued - motion denied with exception as indicated on the record.
1-15-76	Before MISHLER, CH J - case called - deft Esparza & counsel Steven Laifer present - court advised Mr. Rodriguez, the Govts. witness, of his right to speak to defense counsel - Jan. 19, 1976

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(n) - "SPEEDY TRIAL ACT".

BEST COPY AVAILABLE

- for trial.
- 1-19-76 Before Mishler, Ch J - case called - deft present with atty S. Laifer - motion by deft for severance is denied with leave to renew at the end of the government case - Trial ordered and Interpreter E. Rodriguez present for deft Gonzalez - trial to Jan. 21, 1976.
- 1-21-76 Before MISHLER, CH. J. - Case called. Trial resumed. Deft & counsel present. Interpreter Emil Rodriguez sworn. Motion by deft for mistrial denied. Trial continued to 1-22-76 at 10 A.M.
- 1-22/76 Before MISHLER, CH. J. - Case called. Deft and counsel present. Interpreter Emil Rodriguez present. Trial resumed. Govt rests. Motion by deft to dismiss the indictment is denied. Motion for a mistrial denied. All defts rest. Trial contd to 1/26/76.
- 1-26/76 Before MISHLER, CH. J. - Case called. Deft and counsel present. Trial resumed. Jury resumes deliberations. Trial contd to 1/27/76.
- 1-26/76 By MISHLER, CH. J. - Two(2) orders of sustenance filed.
- 1-27-76 Three stenographers transcripts filed (pgs 1 to 688).
- 1-27-76 Before MISHLER, CH J - case called - defts & attys present - Interpreter E. Rodriguez present - trial resumed - at 10:00 am the Jury resumed their deliberations - at 4:30 PM the Jury returned and said that they could not reach a verdict - motion by defts for mistrial is granted - Court declared a Mistrial - Jury discharged - trial concluded - Feb. 23, 1976 for trial.
- 1-27-76 By MISHLER, CH J - Order of sustenance filed.
- 2-11-76 Stenographers transcript filed dated Jan. 26, 1976.
- 2/23/76 Before MISHLER, CH. J. - Case called - deft and counsel present - trial ordered and begun - jurors selected and sworn - trial contd to 2/24/76.
- 2-24-76 Before MISHLER, CH J - case called - defts & attys present - trial resumed - Interpreter E. Rodriguez present - Trial contd to 2-25-76.
- 2-25-76 Before MISHLER, CH J - case called - deft & atty present - Interpreter E. Rodriguez present - trial resumed - Govt rests - motion by all defts to dismiss the indictment is denied - deft rests - motion by defts for judgment of acquittal is denied - trial contd to 2-26-76.
- 2/26/76 Before MISHLER, CH. J. - Case called - deft and counsel present - interpreter present - trial resumed - motion for mistrial denied - jury retires to deliberate - trial contd to 2/27/76.
- 2/26/76 By MISHLER, CH. J. - Order of sustenance filed.
- 2-27-76 4 volumes of transcripts filed (pgs 1 to 783).
- 2-27-76 Before MISHLER, CH J - case called - deft & counsel S. Laifer present - Interpreter Emil Rodriguez present - trial resumed - At 10:00 am Jury retired for further deliberations - Order of Sustenance signed for Lunch - Jury returned at 1:10 PM and rendered a verdict of guilty on counts 1, 2 & 3 as to the deft. Jury polled - Jury discharged - trial concluded - motion by deft to set aside verdict is denied - Memo of verdict signed by the Foreman and ordered filed - bail conditions contd. Sentence adjd without date.
- 2-27-76 By Mishler, Ch J - Order of sustenance signed (Lunch).

75 CR 772 U.S.A. vs. ARMANDO ESPARZA
CRIMINAL DOCKET

DATE	PROCEEDINGS
2-27-76	Memorandum of Verdict filed.
3-1-76	Stenographers transcript filed dated 2-27-76
4-9-76	75 M 2154(CBE) inserted in CR file
5/7/76	Before MISHLER, CH.J.- Case called- deft and counsel present- sentenced adjd to 5/21/76 at 9:30 A.M. on consent
5/21/76	Before MISHLER, CH.J.- Case called- deft and counsel present- deft sen- tenced to imprisonment on counts 1,2 and 3 for a period of 10 years and a special parole term of 5 years- said sentences to run concurrently clerk to file notice of appeal without fee- bail conditions conto pending appeal
5/21/76	Judgment and Commitment filed- certified copies to Marshal
5/21/76	Notice of appeal filed
5/21/76	Docket entries and duplicate of notice of appeal mailed to court of appeals
5/21/76	Financial affidavit filed
5/28/76	Copy of order received from court of appeals and filed that record be docketed on or before 6/14/76

V I N C E N T G U A D A G N I N O , called as a
witness, having been first duly sworn by the Clerk
of the Court, testified as follows:

D I R E C T E X A M I N A T I O N

B Y M R S . A M O N :

M R . L A I F E R : Excuse me, your Honor. May I
approach the side bar for one second?

T H E C O U R T : The jury may be excused.

(The following occurred in the absence of
the jury.)

M R . B E L V E D E R E : May we have this removed,
Judge? The diagram?

M R . L A I F E R : Your Honor, just for the
purpose of the record, Mr. Esparza's rights,
understanding that this is a witness to testify as
to a prior similar act?

T H E C O U R T : Prior, that's right.

M R . L A I F E R : Prior similar act that occurred
some seven years ago, I believe, in 1969, and in
that it concerned itself with a different controlled
substance and was seven years ago, and there is really
no reason for said act to be put before this jury,
I would respectfully object.

T H E C O U R T : It wasn't seven years ago. It

10
2 was a little less than seven, but I have already
3 ruled on it. I find that particularly in light of
4 the examination and the apparent claim and argu-
5 ment that was made or could be made that even if
6 he was in the area, all he did was drove Mr.
7 Gonzalez there and drove him away without knowing
8 that it was a drug transaction, is a prior similar
9 act in point. So you are -- the objection to the
10 testimony is overruled. You have your exception.

11 MR. LAIFER: Thank you, your Honor.

12 (Jury present)

13 BY MRS. AMON:

14 THE COURT: You may proceed, Mrs. Amon.

15 Q Mr. Guadagnino, by whom are you employed?

16 A Drug Enforcement Administration.

17 Q And what is your position with the Drug
18 Enforcement Administration?

19 A Group supervisor in Philadelphia, Pennsylvania.

20 Q And how long have you been with the Drug
21 Enforcement Administration?

22 A Well, I've been with them since it started.
23 I was with a preceeding agency in the drug field.

24 Q Could you explain that, what the preceeding
25 agency was and how long you were there?

Guadagnino-direct

A Well, I -- in 1966 I was with the Bureau of Drug Abuse Control, which was in 1968 was assimilated into Bureau of Narcotics and Dangerous Drugs which then became Drug Enforcement Administration in 1973.

Q By whom were you employed, then, in July of 1969?

A The Bureau of Narcotics and Dangerous Drugs.

Q And what was your position at that time with the Bureau of Narcotics and Dangerous Drugs?

A A special agent.

Q Now, directing your attention to July 8th of 1969, were you on duty on that day?

A Yes.

Q And in what capacity were you acting on that day?

A I was working undercover, purchasing heroin.

Q Now, on that date, and when you were acting in that capacity, did you have occasion to see anyone who you see in the courtroom today?

A Yes.

Q Would you please point to that individual?

A Armando Esparza, the man standing up.

THE COURT: Let the record show the witness pointed out the defendant Armando Esparza.

Guadagnino-direct

Q Do you recall approximately what time on July 8th, 1969, that you first saw the defendant Armando Esparza?

A Approximately a quarter of 11:00.

Q And where was that?

A In Union City, New Jersey.

Q Now, will you explain the circumstances surrounding your encounter with Mr. Esparza on that evening?

A Yes. I made a previous arrangement to meet an individual known as Antonio Cruz, to purchase one ounce of heroin at 9:00 o'clock that day, 9:00 o'clock at night, and I arrived at the meeting place which was 21st Street and Bergenline Avenue in Union City at 9:00 o'clock. Antonio Cruz did not show up. At approximately after waiting an hour, myself, Investigator Mazur and a confidential informant decided to try to locate Antonio Cruz. We then proceeded to the area of the Seafare Bar, which is on 21st Street and Summit Avenue in Union city, New Jersey. I parked the car on 22nd Street and Summit Avenue. Investigator Mazur and the confidential informant walked from the car to the bar. Approximately a quarter of 11:00, Investigator Mazur, the confidential informant approached me while I was sitting in the car with Armando Esparza. I introduced myself to Armando Esparza as Vinnie. Armando

Guadagnino-direct

13 1
2 said, "Call me Mexico. Everybody calls me that." I then
3 spoke to him about purchasing an ounce of heroin and I
4 told him I was upset that Antonio Cruz had not shown up.
5 Esparza at that time told me that Antonio was not very
6 dependable and that I could deal directly with him. He
7 asked me if I was still interested in getting the ounce of
8 heroin. I told him I was. He said I'd have to follow him
9 to Brooklyn. I agreed to follow him to Brooklyn. He left
10 my car, walked towards his car. I then picked up
11 Investigator Mazur and the confidential informant in my
12 car and we followed Armando Esparza in his car. He was
13 accompanied by a Spanish male named Ace to Brooklyn, New
14 York. We parked on Butler Street, between Fourth and
15 Fifth Avenues.

16 Q Can you tell us what happened at that time?
17 At that point?

18 A Yes. Armando Esparza and the other male
19 named Ace got out of the car, walked back towards my car.
20 Armando told me that he would be only a few minutes. He
21 then walked towards Fourth Avenue and turned right out of
22 my line of vision.

23 Q Did there come a time that he returned?

24 A Yes. A few minutes after midnight, Armando
25 Esparza walked back to my car and leaned into the window and

2 handed me 25.5 grams of heroin, which was contained in a
3 tinfoil package. At that time I invited Armando Esparza
4 into the car and asked Investigator Mazur and the confidential
5 informant to walk out of the car, which they did. Mr.
6 Esparza sat down in the passenger seat and I asked him if
7 this was a very good quality and he assured me it was. He
8 stated that the weight was accurate and he told me that
9 after we had done a few more deals, that he would take me
10 right to the place where they would weigh it out right in
11 front of me so I would be sure of the exact weight. I
12 told him that -- at that time that if I liked the quality
13 of the heroin I was purchasing, that I would order four
14 ounces next week. He then told me that he could be reached
15 at a certain phone number, which he wrote down on a brown
16 paper bag which was in the back seat of the car. I then
17 gave him \$1,200 of official Government funds and I told
18 him I'd be calling him. He got out of the car and went
19 back to his. Investigator Mazur and the confidential
20 informant then walked back to my car, they got in and I
21 returned to the Newark District office in Newark, New
22 Jersey.

23 THE COURT: I'd like to charge the jury
24 that this evidence has limited use. First, of
25 course, it has nothing whatever to do with the

Guadagnino-direct

1
2 defendants Delfin "Leo" Gonzalez or Hector Christian
3 and you must keep in mind that the defendant Esparza
4 is charged with entering into a conspiracy that
5 existed some time in May, 1957, and charged with
6 the crime of possessing and distributing cocaine
7 on May 29, 1975. Well, then, what and how may
8 you use evidence, if you credit the evidence of
9 Mr. Guadagnino, of a transaction that took place
10 on July 8th, 1969?

11 Well, if the Government proves to you that
12 Mr. Esparza was present on Eighth Avenue on May
13 29, 1975, and proves to you that Mr. Gonzalez got
14 into his car, that he came to the bar with Mr.
15 Gonzalez or at least was in the car with Mr.
16 Gonzalez, and the Government proves to you that Mr.
17 Gonzalez had the cocaine in his possession and had
18 the proceeds of the transaction in his possession,
19 that still doesn't prove the crime against the
20 defendant Esparza, because the Government must
21 show criminal intent, must show that he knowingly
22 and wilfully, in the first count entered into the
23 conspiracy and was aware as to Counts 2 and 3, which
24 involve possession and distribution, that he came
25 there with Gonzalez or departed with Gonzalez,

1
2 being aware that it was a narcotics transaction
3 and that it just wasn't an innocent event, that
4 his participation was with the knowledge that he
5 was engaged in a narcotics transaction and so if
6 you credit this testimony, you may use it, if you
7 wish, on the question of intent, as to whether Mr.
8 Esparza was aware of what was going on at that
9 particular time and place. Otherwise, it is of
10 no value.

11 Make certain of one thing, that if the
12 Government hasn't got enough to convict Mr.
13 Esparza on the crimes charged here, that if you
14 believe the testimony as to what occurred on July
15 8th, that you don't decide that you will convict
16 him on the charge in this indictment but based on
17 the evidence of what occurred on July 8, 1969.

18 You must keep your eye on the charge in
19 this indictment. Mr. Esparza is not required to
20 defend any other charge than the one in this
21 indictment but you may use the evidence of the
22 other crime on the issue of intent to commit the
23 crimes charged in this indictment.

24 You may proceed.

25 MRS. AMON: Your Honor, may I just have a

1
2 brief side bar? May I just have a vrief side bar?

3 THE COURT: The jury may be excused.

4 (The following occurred in the absence of
5 the jury.)

6 THE COURT: Yes?

7 MRS. AMON: Your Honor, my only additional
8 question to this witness was to ask him
9 whether or not the defendant was arrested in
10 connection with this case.

11 THE COURT: Nothing to do with it. The
12 arrest has nothing to do with the similarity of the
13 crime. Nor, as a matter of fact, would his
14 conviction.

15 MRS. AMON: Well, --

16 THE COURT: You could, of course, --

17 MRS. AMON: -- introduce the --

18 THE COURT: -- introduce certified copy of
19 the judgment of conviction to prove that he did
20 commit a similar crime. But that wouldn't be with
21 this witness.

22 MRS. AMON: Well, would it be possible to
23 do both things? To introduce a certified copy of
24 the conviction, also -- in accordance also with
25 the testimony.

Guadagnino-direct

18 1
2 THE COURT: What does the judgment -- was
3 it in this court?

4 MRS. AMON: Yes.

5 THE COURT: What does the judgment of
6 conviction say?

7 MRS. AMON: Just that he was convicted of --
8 well, just that he was convicted of a tax count.
9 I probably wouldn't do it then in that instance.

10 THE COURT: Then I won't reveal the simi-
11 larity. Anything that would reveal the similarity
12 I would take.

13 MRS. AMON: Then I will say that I have no
14 further questions of this witness.

15 THE COURT: All right.

16 Seat the jury.

17 (Jury present)

18 THE COURT: You may proceed, Mrs. Amon.

19 MRS. AMON: I have no further questions of
20 this witness.

21 THE COURT: Mr. Laifer.

22 MR. LAIFER: Thank you.

23
24 (Continued on next page.)
25

2 CROSS-EXAMINATION

3 BY MR. LAIFER:

4 Q Agent, that took place some seven years
5 ago, is that correct? Six and a half, seven years?

6 A July of '69, sir. Almost seven.

7 Q All right. And the defendant pleaded
8 guilty in that case, Mr. Esparza, didn't he?

9 A Yes, he did.

10 Q Were you there when he pleaded guilty?

11 A No, I wasn't.

12 Q But you know he did?

13 A Yes.

14 Q And he went to jail, is that right?

15 A My understanding, yes.

16 Q And he did his time for that crime, isn't
17 that right?

18 MRS. AMON: I object to that question, your
19 Honor.

20 THE COURT: It's quite irrelevant. Objection
21 sustained.

22 MR. LAIFER: No further questions.

23 THE COURT: Mr. Asen, any questions?

24 MR. ASEN: No, I have no questions.

25 THE COURT: Do you have any questions,

Mr. Belvedere?

MR. BELVEDERE: No, sir.

THE COURT: Anything further, Mrs. Amon?

MRS. AMON: No, your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you.

THE COURT: Is that the Government case?

MRS. AMON: Yes, your Honor. At this time
the Government rests.

THE COURT: We'll just take a short recess
and then I'll ask you to come back again.

(Jury out)

(Continued on next page.)

1
2 horse's mouth, and he told them that the stuff had
3 arrived and he was ready. And he told him to work out
4 the details of this transaction to Leo Gonzalez.

5 And you learned that the transaction was set up
6 for May 29, 1975. And I submit to you that Leo
7 Gonzalez and Armando Esparza had worked out their game
8 plan for that evening.

9 You learned that Leo Gonzalez arrived early,
10 that he came into the Tollgate bar and they met with
11 Luis Rodriguez. He was assured by Luis Rodriguez at
12 this time that the transaction was going, and that his
13 people would be coming. He then left on foot, got
14 the defendant Armando Esparza and returned to the bar
15 with Mr. Esparza.

16 You learned also that when Luis Rodriguez came
17 the first time that he parked his car in this location,
18 and at that time the drugs were concealed in
19 Mr. Gonzalez's car. And at approximately 10:20
20 Mr. Esparza, as you learned, brought Gonzalez back,
21 parked his car where he could see what was happening.

22 I submit to you, ladies and gentlemen, that
23 Mr. Esparza was no stranger to drug transactions. He
24 knew how to handle himself, and he was a very cautious
25 man.

1
2 First of all he was not going to have anything
3 to do with transporting the drugs himself or engaging
4 directly in the sale of the drugs himself. Neither
5 was he going to be anywhere near the location of this
6 car where the drugs were concealed.

7 Ladies and gentlemen, I submit to you that
8 Mr. Esparza had learned his lesson. The last time that
9 he had dealt, that he had cut out a middle man and
10 dealt directly with a stranger, you learned that that
11 stranger turned out to be a Government agent.

12 MR. LAIFER: Objection, your Honor. I move for
13 a mistrial.

14 THE COURT: Overruled. Motion denied.

15 MRS. AMON: And that Government agent you
16 learned was Vinny Guadagnino. And it wasn't necessary,
17 ladies and gentlemen, for Mr. Esparza to take any
18 unnecessary chances on this occasion because he had
19 Leo Gonzalez to do that for him. Leo Gonzalez was
20 his deliveryman.

21 But there were two important functions that
22 Mr. Esparza had to fill on that evening, and there were
23 two reasons why he had to be there. And the first
24 reason was to protect his investment. The second
25 reason, ladies and gentlemen, was to make sure that

14 Summation - Amon

He hands a package of cocaine to him.

But even more so than that he tells him, he says, "I can do a half a kil" or "kilo the following week."

There is also testimony -- other testimony about Armando Esparza, as you will recall, and that's the testimony of Paul Sennett.

Paul Sennett explained to you what Mr. Esparza's purpose was on that occasion. You know, too, that --

MR. LAIFER: Objection to that. That is unfair comment.

THE COURT: Objection overruled. It is fair comment.

MRS. AMON: And when you are considering, too, ladies and gentlemen, whether Mr. -- what Mr. Esparza's intent was there, whether he was there unintentionally or whether he knew exactly what this transaction was about, I can ask you to consider the testimony that you heard from Vinnie Guadagnino.

Are all of these people, ladies and gentlemen, lying to you?

MR. LAIFER: I object to that, your Honor.

8 1 THE COURT: You have before you a document
2 called Memorandum of Verdict. There is nothing
3 official about this document. It is just that it is
4 a precis or summary of the charges so that you may
5 know what the charges are against each of these
6 defendants.

7 One of the lawyers said that there are three
8 trials. There are probably seven trials, because
9 each defendant should be judged separately as to each
10 count.

11 Two defendants have a total of six counts and
12 one defendant, Hector Christian, is charged in only
13 the first count, and as I go through my charge, I
14 will be using the singular and plural, defendant and
15 defendants interchangeably, and if I use it in the
16 singular, it means all the defendants collectively
17 unless I single a defendant out for a specific charge.

18 The case is entitled United States of America
19 against Armando Esparza, Delfin Leo Gonzalez and
20 Hector Christian. There is no significance to be
21 attached to the order in which the defendants are
22 named. There is nothing either in the logic or the
23 law that puts one defendant first or one last.

24 It is just that someone has to be named first
25 and someone has to be named last and someone has to

9 1 be named second. That is the only reason they are in
2 that order.

3 We might start this instruction by understanding
4 who the participants in the trial are and what their
5 functions are in a jury trial.

6 It is easy to understand that the defendants
7 are here because they are charged with a crime. The
8 indictment, of course, is no proof. The proof must
9 come from the mouths of witnesses or the exhibits
10 that are marked in evidence or, as in this case,
11 stipulation by the attorneys, or facts which are
12 judicially noticed by the Court.

13 The defendants have pleaded not guilty to all
14 the crimes with which they are charged in the
15 indictment.

16 Defendants' counsel are representatives of
17 their clients' interests. They are protagonists.
18 They are charged with representing their clients,
19 with zeal and dedication, and they are partial.

20 That is as true of Mrs. Amon as it is of the
21 defendants' counsel, Mr. Laifer and Mr. Asen and
22 Mr. Belvedere.

23 During the trial objections were made and the
24 Court ruled on them. They had their duty and I had
25 mine. They had the obligation of protecting their

Charge

clients' interests and I had the obligation of ruling.

There were very few heated exchanges, but if there were any, forget the heat. It has nothing to do with the case. The defendants are on trial. The arguments that the Court has with the lawyers on the law is only a question of law and it has nothing to do with the merits, as far as you are concerned.

We understand the role of the lawyers and it is important that we understand our respective roles.

You, the jury, are the sole judges of the facts. You and you alone decide what happened on April 21st or April 20th, on May 15, 16, May 29th, May 17th, May 19th, September 5th and all the various dates.

These are contested issues. Both sides take diametrically opposed positions on all the vital issues in this case.

Of course, it is a question of credibility. You will weigh the testimony. You will come to a final decision as to what occurred.

That is what we mean when we say the jury is the sole arbiter of the facts, the sole judge of the facts.

The Court, on the other hand, is the sole judge

Charge

1
2 of the law, and though I am flattered by what one
3 counsel said about my expertise in the law, I am not
4 Moses. I did not make the law. I interpret it and
5 my function is to interpret it to the best of my
6 ability. I will do my best, and that means trying to
7 explain the law to you in laymen's language, and that
8 is why I used this method instead of just reading
9 from a paper. I want communication between myself
10 and the jury. I do not want the jury to think there
11 is something esoteric and complex in the law. The
12 law really is quite logical and if you give yourself
13 half a chance, you will find it is not difficult to
14 understand.

15 The Congress in 1970 passed what we call The
16 Drug Abuse Control Act of 1970, which became effective
17 May 1, 1971. I will read portions of that law to
18 you as they relate to this charge. You must accept
19 the law as the Congress enacted it, as I interpret it
20 and as I instruct it.

21 You may even disagree with it. You may not
22 like it. But you have the obligation to accept the
23 law as I charge it, at face value, without question,
24 as I have the obligation to accept your fact findings
25 and having made your findings you have the obligation

Charge

12 1
2 to apply the law as I charge it and make a determination
3 as to each defendant as to each charge.

4 The first basic, well understood, time honored
5 principle in Anglo American law is that the defendants
6 are presumed to be innocent of all the charges in the
7 indictment. It is a strong presumption. It means
8 that at the outset of the trial you must conclude that
9 each defendant is innocent of each charge made against
10 him, and that presumption remains throughout the
11 trial and throughout your deliberations.

12 It is enough to acquit a defendant.

13 It is only overcome if the Government proves
14 the guilt of the defendant as to each charge by proof
15 beyond a reasonable doubt.

16 If the Government fails in its burden, then
17 you have the duty to find the defendant not guilty.

18 A reasonable doubt is a doubt which a
19 reasonable person would have after weighing all the
20 evidence in the case. It is a doubt based on reason
21 and common sense and the state of the record, which
22 means the evidence in the case, as distinguished from
23 some vague, speculative or imaginary doubt.

24 It is not the kind of doubt that an individual
25 would have because he is reluctant to perform an

Charge

unpleasant task.

We all know that very few enjoy finding any fellow American or citizen or alien guilty, but it is not that kind of an emotional doubt.

A reasonable doubt is a kind of doubt that would make a reasonable person hesitate to act in a matter of importance to himself or herself. Proof beyond a reasonable doubt is therefore proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

(Continued on next page)

R fols.

1 charge

2 THE COURT: (continuing) The Government is
3 not required to prove to you that every bit of evi-
4 dence, every bit of testimony, every Exhibit, is true
5 beyond a reasonable doubt.

6 The Government's burden, heavy as it is, is
7 that all the essential elements of the crime charged
8 are established by proof beyond a reasonable doubt.

9 Later in the charge I will set out detail or
10 list the elements of the crime. What we do is frag-
11 ment the crime so that you can focus on each element.
12 We list it.

13 Mrs. Amon in her summation said something
14 about "conspiracy." She was correct as far as she
15 went but she did not go far enough in giving you all
16 the elements of the crime charged. So, for the moment,
17 disregard what she said about the elements of con-
18 spiracy. I will charge you on what the elements are.

19 The Defendant does not have the burden of
20 Proving his innocence. The defendant need not offer
21 any bit of evidence to establish his innocence. The
22 Defendant may rely on the failure of the government
23 to sustain its burden of proof.

24 What is evidence? Evidence is the method that
25 the law uses to prove or disprove a disputed fact. It

charge on Esparza

is generally classified as direct evidence or indirect or circumstantial evidence.

It is easy enough to understand the definition of direct evidence. It is the testimony that witnesses give you, relate about an event or a conversation. They say they saw it, heard it; that is direct evidence.

The definition of circumstantial evidence is easy to give but kind of difficult to understand. We say that circumstantial evidence is a method of proving or disproving a disputed fact by drawing a reasonable inference based on good common sense and experience from all the surrounding facts.

Whenever I say that, I say, "Well, that is beautiful but I wonder if I and the jury really understand it."

I think it is best demonstrated by an example -- and I have given this example any number of times and I think it does point out the difference. If my courtroom Deputy, Mr. Adler, and myself are standing on a street corner and there is a stop sign at that corner, let's assume for the hypothetical example he had his back to the roadway and I had my face facing the roadway and the stop sign. Let's assume that a

1 3 charge on Esparza

2 1976 white Cadillac was coming down the roadway at
3 60 miles an hour, past the stop sign without stopping
4 and struck a woman called Mrs. A, who was injured.

5 In that hypothetical, let's assume that you
6 are sitting as the jury in that case. The plaintiff
7 sues for her injuries. She says, in effect, the
8 Defendant violated the Vehicle and Traffic Law by
9 failing to stop at the stop sign before proceeding.

10 The Defendant says, no, I stopped at the stop
11 sign and then proceeded.

12 You must first identify the disputed fact.
13 That is the issue in the case.

14 So if I were called to the stand I would tes-
15 tify that I was speaking with Mr. Adler, the other
16 circumstances that might bear on the issue, the time
17 of day, and whether it was light out, and how wide
18 the roadway, and then the important question, did
19 the Defendant pass the stop sign without stopping.
20 Yes, I saw the Defendant's car at 60 miles an hour
21 proceeding down the roadway and pass the stop sign
22 without stopping. That is direct evidence on that
23 issue.

24 Now, my courtroom Deputy, Mr. Adler, is called
25 to the stand. He can not give direct testimony on the

4 charge on Esparza

1 issue, but he may testify to the surrounding circum-
2 stances. For example, he might say yes, I was talking
3 with the Judge and as I turned to my right I saw this
4 1976 Cadillac coming down at 60 miles an hour and
5 then it passed behind me and I lost sight of it for
6 about, let's say, two or three seconds, about 150
7 feet, and then I turned to my left and I saw it pro-
8 ceeding at the same rate of speed and struck this
9 plaintiff.
10

11 I think you would agree with me that logic
12 and reason, experience and common sense would dictate
13 to you that a fair and reasonable inference could be
14 drawn from Mr. Adler's testimony alone would be that
15 that motor vehicle passed the stop sign without stop-
16 ping, if you credit his testimony, because from those
17 circumstances, the fact that he lost sight of it and
18 the car traversed about 150 feet over a period of
19 two or three seconds, the car could not have stopped
20 and then proceeded.

21 So there you have the direct testimony and the
22 indirect testimony or circumstantial evidence.

23 The law does not hold that one form of evi-
24 dence is of better quality than the other.

25 The law only requires that on the direct and

1 5 charge on Esparza

2 the circumstantial evidence the Government must prove
3 all the essential elements of the crime charged beyond
4 a reasonable doubt.

5 When it comes to the question of criminal in-
6 tent, which is something I will charge you on, spe-
7 cifically with reference to Mr. Gonzalez and his tes-
8 timony, criminal intent is a state of mind. There is
9 no way that you can possibly get direct testimony,
10 except possibly by what somebody says, if you believe
11 he is expressing his state of mind. But that, too, is
12 a circumstance, but the direct testimony, if you can
13 think of looking into a man's mind, is the way you
14 see his state of mind. Otherwise, criminal intent is
15 normally proved by all the circumstances, what a man
16 does, what a man says, and from that you can draw a
17 fair and reasonable inference as to whether he had
18 criminal intent or, to put it in the framework of
19 burden of proof, as to whether the Government proved
20 Criminal intent by proof beyond a reasonable doubt.

21 I used the term "inference" and I used the term
22 "presumption." An inference is a conclusion which
23 reason and common sense lead a jury to draw from facts
24 which have been established by the evidence in the case.
25 The jury draws an inference based on experience and

6 charge on Esparza

common sense and that is discretionary.

However, a presumption is a conclusion which the law requires the jury to make and remains unless overcome by competent proof to the contrary, and of course the presumption of reasonable doubt, the Government must overcome that presumption by proof beyond a reasonable doubt.

You, the jurors, are the sole judges of the credibility of the Witnesses, which means the believability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each Witness testified and every matter in evidence which tends to show whether a Witness is worthy of belief.

Consider each Witness's intelligence. Consider his mode and state of mind. Why is a Witness testifying? Consider the demeanor and manner in which the Witness answered while on the witness stand. Did his testimony have the ring of truth? Did he impress you as one who is telling you fully and fairly what he recollects? Is he evasive?

Take into consideration the Witness's own ability to observe the matters as to which he has testified, whether he shall have impressed you as

1 7 charge on Esparza

2 having an accurate recollection of these matters.

3 Take into consideration the relationship the
4 Witness bears to the case and how the Witness would
5 be affected by the outcome of the case. Take into
6 consideration the extent to which, if any, the
7 Witness is corroborated or contradicted by his own
8 testimony or other testimony in the case.

9 Louis Rodriguez testified that he participated
10 in the crime charged. You have the right to suspect
11 the testimony of a participant in the crime charged
12 if you find that he has a personal stake in the out-
13 come of the trial or if you find that he believes that
14 the rewards promised depend on the outcome of the
15 trial.

16 Louis Rodriguez is not incompetent to testify
17 because of his participation in the crime charged.

18 On the contrary, the testimony of a partici-
19 pant, alone, if believed by a jury to be true beyond
20 a reasonable doubt may be of sufficient weight to
21 sustain a verdict of guilty, even though not corrob-
22 orated or supported by other testimony in the case.

23 The jury should keep in mind that the testi-
24 mony of a participant in the crime is always to be
25 received with caution, weighed with care.

1 8 charge on Esparza

2 The testimony of a Witness who provides evi-
3 dence against a Defendant for pay or for immunity
4 from punishment or for personal advantage or vindica-
5 tion must be examined and weighed by the jury with
6 greater care than the testimony of an ordinary Witness.

7 The jury must determine whether the informer's
8 testimony has been affected by interest or by preju-
9 dice against the Defendant.

10 In the same manner, the testimony of a Witness
11 may be discredited or impeached by showing that the
12 Witness has been convicted of a felony; that is, a
13 Crime punishable by a term of years.

14 Prior conviction does not render a Witness's
15 testimony incompetent or, rather, inadmissible, or
16 the Witness incompetent, but it is merely a circum-
17 stance which you may consider in determining the
18 credibility of the Witness.

19 It is the province of the jury to determine
20 the weight to be given the testimony of a felon or
21 an informant or participant.

22 My recollection is that the Defendant, Louis
23 Rodriguez, was faced with prior inconsistent state-
24 ments, something he said before he came to the wit-
25 ness stand or a failure to give information at a prior

9 charge on Esparza

1 time when it wa reasonable to expect that he should
2 have given the information that he at the same time
3 testified before you. This is called ~~impeaching tes-~~
4 ~~timony.~~
5

6 I think our common sense and experience tells
7 us that if a Witness were to retell the same version
8 of an occurrence phrase for phrase and word for word
9 and gesture for gesture, time and time again, you
10 would have a reason to suspect it and you would have
11 reason to suspect that it was rehearsed.

12 Mr. Clerk, would you be good enough to ask
13 them to delay that banging for about a half hour?

14 THE CLERK: Yes, your Honor.

15 THE COURT: We moved into this court house
16 in 1965 but they are still building it.

17 So we recognize that there are variations in
18 the retelling and the variations even lend support
19 to the credibility.

20 At times the inconsistent statement does
21 affect the credibilitv, the believability of a
22 Witness. Well, first you determine whether the state-
23 ment is inconsistent. Take into consideration all
24 the circumstances under which the prior statement
25 was made and then you determine the extent, if any,

1 charge on Esparza

2 to which the Witness's testimony is affected.

3 If you find that a Witness has knowingly tes-
4 tified falsely as to a material fact you may disre-
5 gard all that Witness's testimony on the ground the
6 Witness is unworthy of belief.

7 On the other hand, you may, if you wish, accept
8 so much of that Witness's testimony that you believe
9 is true.

10 The principle simply underscores the wide dis-
11 cretion that the jury has in assessing the credibility
12 of the Witnesses.

13 A Defendant who wishes to testify is competent
14 as a Witness. You must judge his testimony in the
15 same manner as any other Witness.

16 However, the law does not compel a Defendant
17 in a criminal case to take the witness stand and tes-
18 tify. No presumption of guilt may be raised and no
19 unfavorable inference of any kind may be drawn from
20 the failure of a Defendant to testify. A Defendant,
21 as previously charged, may rely on the failure of the
22 Government to prove its case.

23 It would be improper for you to discuss the
24 failure of a Defendant to testify during your delib-
25 erations.

11 charge on Esparza

1 Now, turning to the indictment. I am going
2 to read ~~the three counts~~. The first count is a conspir-
3 acy count and you have a summary of the counts there,
4 and the two other counts involve the alleged transac-
5 tion which took place on May 29, 1975.
6

7 You will find that though it was one event,
8 two crimes are charged. One is for the possession of
9 the 115 grams of cocaine and the other is for the
10 distribution.

11 Count 1 charges as follows:

12 "On or about and between the 16th day of May,
13 1975 and the 31st day of May, 1975, both dates being
14 approximate and inclusive, within the Eastern Dis-
15 trict of New York, the Defendants Armando Esparza,
16 Delfin "Leo" Gonzalez, and Hector Christian did
17 knowingly, willfully, and unlawfully come by, con-
18 spire, confederate and agree together and with each
19 other to knowingly and intentionally distribute a
20 quantity of cocaine, a schedule II narcotic drug con-
21 trolled substance in violation of Section 841 (a) (1)
22 of Title 21, United States Code." It is in violation
23 of Title 21, United States Code, Section 846.

24 That is called the conspiracy count and I will
25 explain it in greater detail later on.

1
2 What the law proscribes there is the entering
3 into and the arrangement or a venture for the purpose
4 of violating the law, not the possession or the dis-
5 tribution of the cocaine, but the understanding, the
6 agreement, the partnership, the getting together for
7 that purpose.

8 Count 2, this is what we call the substantive
9 crime. The other is called the conspiracy.

10 "On or about the 29th day of May, 1975, within
11 the Eastern District of New York, the Defendants
12 Armando Esparzo, Delfin "Leo" Gonzalez did knowingly
13 and intentionally possess with intent to distribute
14 approximately 115 grams of cocaine, a Schedule II
15 narcotic drug controlled substance, in violation of
16 Title I, United States Code, Section 841 (a) (1) and
17 Title 18, United States Code, Section 2."

18 Count 3:

19 "On or about the 29th day of May, 1975, within
20 the Eastern District of New York, the Defendants
21 Armando Esparza and Delfin "Leo" Gonzalez did know-
22 ingly and intentionally distribute approximately 115
23 grams of cocaine, a schedule II narcotic drug con-
24 trolled substance, in violation of Title 21, United
25 States Code, Section 841 (a) (1) and Title 18, United

1
2 States Code, Section .2."

3 As I explained, Congress passed what we call
4 the Drug Abuse Act of 1970 and placed it under desig-
5 nated Sections of our code. Most of our congressional
6 statute is codified. This happens to be Title 21. It's
7 Food and Drugs.

8 Whether activity is a crime or not depends on
9 what the Congress says is a crime. So the Congress
10 says that cocaine is what we call a Schedule II Drug.
11 Congress made certain schedules of various drugs,
12 and under this specific provision it's (a) (1), it
13 says "coca leaves and any salt, compound, derivative
14 or preparation of coca leaves" is a Schedule II Drug.

15 I charge you that cocaine is a Schedule II
16 drug.

17 Then under Section 841 (a) (1) it made it a
18 crime to deal in any way in cocaine except as author-
19 ized -- and it is not pertinent here, there is no
20 showing that it is authorized -- it says "Except
21 as authorized by the sub-chapter, it shall be unlaw-
22 ful for any person knowingly or intentionally to
23 distribute or possess with intent to distribute a
24 controlled substance."

25 I charge you that cocaine is a controlled

1 13a charge on Esparza

2 substance. It is listed under the schedule, Schedule

3 II.

4 That will give you the statutory basis for the
5 charge in counts two and three.

6 (continued on next page)

1
2 The basis for the conspiracy charge is a very
3 simple phrase found in another section of the act. It
4 says "Any person who conspires to commit any offense
5 defined in the subchapter" commits the crime of conspiracy.
6 The phrase is as simple as that.

7 A conspiracy is defined as a combination of two
8 or more people who by concerted action get together to
9 accomplish an unlawful purpose. In this case the charge
10 is that the three defendants named got together to
11 violate Section 841 (a) (1) which says Do not distribute
12 or possess or deal in cocaine -- I'm paraphrasing it,
13 but I want to bring it within the framework of this
14 charge.

15 So that a conspiracy charge in effect says, you
16 got together to violate a section of the act. That was
17 the unlawful purpose.

18 The mere similarity of conduct among various
19 persons and the fact that they may associate with each
20 other, they have assembled together and discussed, com
21 mon aims and interests, does not necessarily establish
22 a conspiracy. Mere presence does not establish a
23 conspiracy, and mere presence knowing that conspiratorial
24 activity is going on does not establish the conspiracy.
25

1
2 The government must prove a knowing and willful parti-
3 cipation, doing something to advance the purposes of
4 the conspiracy, in this case to advance the purposes
5 of a cocaine sale.

6 The mere fact that someone was there, even knew
7 what was going on, heard what was going on and said nothing,
8 did nothing, does not bring that individual into the
9 conspiracy. It's the being part of it, helping it,
10 negotiating, bringing people together, delivering it,
11 transporting people to the conspiratorial activity
12 knowingly and willfully done -- that type of activity
13 can bring someone into the conspiracy. But mere knowing
14 about it cannot.

15 The evidence in the case need not show that the
16 members of the conspiracy entered into any formal or
17 express contract or that they directly by word or
18 action or in writing set out the details and purposes
19 of the conspiracy. What the evidence in the case must
20 show beyond a reasonable doubt in order to establish
21 proof that a conspiracy existed is that the members
22 in some way or in some manner or through some contri-
23 vance openly or tacitly came to a mutual understanding
24 to try to accomplish the unlawful act, in this case the
25 cocaine sale.

charge on Esparza

The government must prove beyond a reasonable doubt that the conspiracy was knowingly formed -- in other words, the parties to the conspiracy were aware that they were engaging in the cocaine business or getting together for a cocaine sale, and that one or more or the methods, described in the indictment to accomplish the purpose was used, and that two or more persons at least one of whom is one of the accused were. That thereafter one of the members of the conspiracy -- it doesn't have to be the one of the accused -- but that one of the members of the conspiracy knowingly performed an overt act in furtherance of the objectives or purposes of the conspiracy.

Now, an overt act is one that you can see and hear. It's not covert, it's not concealed. It's something you see. But the overt act must be knowingly performed by the member of the conspiracy. In other words, being aware that he was aiding the success or participating in the activity with the intent and purpose of effecting the objects of the conspiracy, the sale of the cocaine, and that the overt act was in fact in furtherance of the conspiracy, to help it along.

Now, one may become a member of the conspiracy without knowing all the purposes, all the objects of the

1 conspiracy. One may become a member of the conspiracy
2 even though he doesn't know all the members of the con-
3 spiracy and doesn't know all the activities of the con-
4 spiracy. The proof need not show that the partners were
5 all equal, that they all performed the same roles.
6

7 The government in this case claims that Hector
8 Christian performed a different role than Delfin Leo
9 Gonzales and a different role than Armando Esparza,
10 the government claims that while he was a member of the
11 conspiracy Louis Rodriguez performed a different role.

12 It is necessary for the government to show
13 that each defendant, each accused who entered the conspiracy,
14 knew and understood that he was dealing in cocaine, knew
15 that there were other members of the conspiracy, and
16 recognized that the success of the conspiracy, depended
17 on others who had various roles in the conspiracy, the
18 supplier, the carrier, the broker.

19 In determining whether the accused knowingly
20 and willfully entered a conspiracy it must be on evidence
21 before you, testimony of what that particular defendant
22 said and did to bring him within the conspiracy.

23 During the trial, at the early part of the trial,
24 I charged you when a witness talked
25

charge on Esparza

with others outside the hearing of any of the accused, or if it was with one of the accused, when the other two were not present, I charged you that the acts and declarations of one whom you find to be a member of the conspiracy cannot bind the other accused unless and until you find that the accused knowingly and willfully entered into the conspiracy.

So I said to you, "Hold that aside, put it in the cubbyhole, it doesn't apply to these defendants, unless you find that the government has proved beyond a reasonable doubt that the conspiracy existed, that one of the parties to the conversation was a member of a conspiracy, and proves that he knowingly and willfully entered that conspiracy, that the conversation or act was during the term of the conspiracy and in pursuance of the objects and purposes of the conspiracy, and then it may be charged against any accused whom you find knowingly and willfully entered the conspiracy."

Then anything that any member of the conspiracy, partner, said outside the hearing of others nevertheless binds all the others, if it is made, as I said, during the term of the conspiracy and to further the objects or purposes of the conspiracy.

That's a rule of evidence, how to treat the

1 evidence. The evidence is introduced for limited pur-
2 poses, and subject to connection.
3

4 The other principle I just charged you on is where
5 I said in order for the government to prove that a
6 defendant or an accused knowingly and willfully entered
7 the conspiracy it must be on testimony on what that
8 particular defendant said or did, not what somebody else
9 said or did. You see that is a principle of criminal
10 liability, because criminal liability is personal, it's
11 individual, it's something a defendant says or does.

12 So in order to bring someone into a conspiracy,
13 which is a criminal act, it must be on what that par-
14 ticular accused says or does. On the other hand, once he
15 has become a member of the conspiracy, now that requirement
16 of individual personal responsibility has been satisfied,
17 then he is responsible for what any other partner does.
18 I want to distinguish, because that principle is not
19 easy grasp -- to distinguish between on the one hand
20 the type of evidence necessary to bring someone into the
21 conspiracy, and on the other hand, the principle that
22 deals with evidence where you may charge an accused with
23 acts or declarations of the conspiracy even though that
24 accused is not present at the time and place.
25

charge on Esparza

7 1
2 If it appears beyond a reasonable doubt from the
3 evidence in the case that the conspiracy alleged in the
4 indictment was knowingly and willfully performed, that
5 the accused knowingly and willfully became members of
6 the conspiracy either at the inception or the beginning
7 of the plan or after -- and it doesn't matter if it's
8 after, because when one knowingly and willfully joins
9 a conspiracy he's responsible for everything that occur-
10 red prior to his entry, from the time of its beginning--
11 and that thereafter one or more of the conspirators
12 knowingly committed an overt act in furtherance of the
13 object, the purpose of the conspiracy, then the crime
14 is completed and it's immaterial whether the conspiracy
15 succeeded.

16 It is not necessary for the government to prove
17 that the cocaine was actually bought and/or sold. The
18 success of the conspiracy is not a part of the crime
19 of conspiracy. It is not an essential element of the
20 crime charged.

21 In this regard I think I should first charge you
22 on the essential elements on the crime of conspiracy.
23 The government must prove beyond a reasonable doubt,
24 1, that the conspiracy described in the indictment was
25 knowingly and willfully formed and was existing at or

charge on Esparza

about the time alleged.

2, That the accused knowingly and willfully became a member of the conspiracy -- and I described what knowingly and willfully means; it means that the accused was aware of what he was doing, he was aware when he went into this conspiracy that was dealing in cocaine, that he did it willfully -- that means voluntarily -- and intentionally, knowing that he was violating the law.

And 3, that one of the conspirators, any one of the conspirators thereafter knowingly committed an overt act -- and I described what an overt act was; it could be making a phone call to set up an appointment to negotiate the cocaine, it could be delivering the cocaine, it could be discussing the deal, the price, the terms, it could be going to the place or transporting someone else to the place for the cocaine deal knowing that it was for that purpose; it doesn't necessarily have to be a criminal act in and of itself; it doesn't have to be the transfer of cocaine, though of course it can be; but it can be a perfectly lawful act in and of itself -- but it has to be knowingly done.

And again, knowingly, knowing it is to help and further the purposes of the conspiracy.

1
2 And 4, that the overt act was knowingly done in
3 furtherance of the object or purpose of the conspiracy.

4 In this regard, I want to call attention to the
5 argument made by Mr. Belvedere that on May 16th -- I think
6 it was Mr. Louis Rodriguez who testified that on May 16th
7 Rodreguez told Hector Christian that he was going to deal
8 with the source directly but that he would take care of
9 him or see that he was taken care of , and Mr. Belvedere
10 argued that he'd never heard about Mr. Christian again
11 during the term of this conspiracy, down to and including
12 the 29th of May. He argued that he withdrew from the
13 conspiracy.

14 Well, the government argues he did not. It's a
15 fact question for the jury to determine, If the govern-
16 ment proved all the essential elements of the crime charged
17 before Mr. Christian -- if you find that he withdrew,
18 withdrew from the conspiracy and you find that the
19 government proved all the essential elements of the
20 crime charged before he withdrew, once criminal liability
21 is imposed he is not absolved because he later withdrew.
22 The crime was committed and completed. And if you find
23 that all the elements of the crime were proved, the fact
24 that he did nothing else, the
25

charge on Esparza

fact that he wasn't present on May 29th, had nothing to do with the deal, would not relieve him of criminal liability as to count one, Conspiracy.

On the other hand, if all the elements of the crime charge have not been accomplished, in other words, that the conspiracy was formed, they understood they were dealing in cocaine, that he had knowingly and willfully become a member of it, that one of the members, performed an overt act knowingly and in furtherance of the objects of the conspiracy -- again, if the government proved all that the fact that he withdrew would not affect his criminal liability.

However, if he withdrew before the crime was accomplished then you must find him not guilty.

Now, count two charges that the defendants Esparza and Gonzales knowingly and intentionally possessed about 115 grams of cocaine with intent to distribute. The law makes a distinction: the possession was not for personal use, it wouldn't be a crime under the section, but for sale. It was that he had it for sale or to give it away.

The government must prove beyond a reasonable doubt that the following essential elements of the crime to sustain count two: 1, the act of possessing the cocaine

1
2 2, that such possession was knowing or intentional,
3 in other words, not accidental. If someone just slipped
4 some cocaine into someone's pocket, he didn't know it was
5 there, the possession is there but there is where we
6 have a lack of criminal intent. The government must prove
7 first that he knew it was cocaine, and 3, that it
8 was possessed with intent to distribute to sell it,
9 to do something with it.

10 The government must prove those three essential
11 elements of the crime charged.

12 (continued next page)
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1 charge on Esparza

2 THE COURT: Count three. Here the Government
3 Charges the Defendants Esparza and Gonzalez with the
4 actual distribution, the sale of it. The Government
5 must prove beyond a reasonable doubt that on May 29th,
6 1975 Esparza and Gonzalez sold this 115 -- approxi-
7 mately 115 grams of cocaine, and that such distribu-
8 tion, such sale, was knowing and intentional, they
9 were aware that it was cocaine and they intended, it
10 was their voluntary act, to distribute it.

11 There is no proof in the record that the Defend-
12 ant Esparza ever had the cocaine in his possession.
13 Possession may be either actual or constructive. I
14 have these eyeglasses in my hand. They are within my
15 immediate control. We call it domination and control,
16 if you want to use the legal phrase of art. - I have
17 Within my immediate power to hold it, destroy it,
18 throw it away. That's actual possession.

19 Constructive possession is that possession which
20 is not actual but where I still have domination and
21 control, maybe in my chambers, maybe in my optometrist's
22 shop. I have the right to it and I have the right to
23 possess it, so that's constructive possession.

24 Possession may be sole or joint. Let's say I
25 have, to be very careful about it, five pounds of sugar

1
2 and I have it in my possession but actually it was
3 Mr. Adler's sugar and mine. Well, if I were holding
4 it for both of us, even though I were holding it,
5 had actual possession, this is joint possession. He
6 would have constructive possession, I would have
7 actual.

8 The Government need only prove possession, it
9 doesn't have to prove it was actually purchased. If
10 the Government proves that the possession was joint
11 or constructive that will suffice. It has to prove it
12 beyond a reasonable doubt.

13 Now, you've heard me cite Title 18, United
14 States Code, Section 2. I might warn you before that
15 whenever I charge on the aiding and abetting section
16 or very often jurors will say, well, will you please
17 charge on conspiracy again and then on aiding and
18 abetting, and then the third question is, what is
19 the difference?

20 Well, in order to put a quietus on any other
21 concern about it, I will say this: I find it very
22 difficult to distinguish between aiding and abetting
23 and conspiracy when the purpose of the conspiracy is
24 allegedly accomplished. I find it easier to talk about
25 it on a theoretical basis, if you just try to follow

1 3- charge on Esparza
2 for a moment I'll try to tell you what the difference
3 is.

4 I started this charge off by saying that the
5 theory of conspiracy is that crime is the getting
6 together. Completion of the crime, success of the
7 Crime has nothing to do with it.

8 So if the crime charged here did not include
9 the transaction of May 29th I would nevertheless
10 Submit the question to the jury as to whether a
11 crime was committed. It is not essential to prove
12 that the crime was completed, in other words that
13 the cocaine was passed, the deal was closed.

14 However, in aiding and abetting one cannot
15 aid or abet an incompleated crime. You must first
16 prove that the crime was committed, and then you
17 must prove that the aider and abettor knowingly and
18 willfully aided, abetted, counseled or participated
19 knowingly and willfully in that crime.

20 So I don't usually do it this way. I wait
21 until I hear from the jury, but maybe it's a better
22 way to do it to tell you at the outset.

23 Now I will come back to what aiding and abet-
24 ting is. In a case where two or more persons are
25 charged with the commission of a crime the guilt of

4 charge on Esparza

1
2 guilt of any Defendant may be established without
3 proof that he personally did ~~every act~~ constituting
4 the offense charged. The section reads as follows,
5 in whole or in part:

6 "Whoever commits an offense against the United
7 States, or aids, abets, counsels, commands, induces
8 or procures this commission, is punishable as a prin-
9 cipal of it. Whoever willfully causes an act to be
10 done which is directly performed by him or another
11 would be an offense against the United States is
12 punishable as a principal."

13 In other words, any person who willfully par-
14 ticipates in the commission of a crime may be found
15 to be guilty of the offense. Participation is willful
16 is done voluntarily and intentionally and with spe-
17 cific intent to do something which the law forbids.

18 In order to aid and abet another to commit a
19 Crime, it is thus necessary that the accused do
20 willfully associate himself with the criminals in
21 some way and should willfully participate in it as
22 he would in something he wishes to bring about.

23 Now, of course the Government must prove that
24 the accused did knowingly and willfully do something
25 to make the crime succeed and must prove that by

proof beyond a reasonable doubt.

If you get tired of listening to me and I'll call a short recess. I will conclude in about ten or fifteen minutes. If you would like to suspend, say so.

Now, I charged you on the limited use of testimony of Rodriguez concerning conversations with Christian in April of 1975. The charge in the indictment is that the conspiracy commenced on or about May 16th. I advised you that on or about doesn't mean that the Government must prove that it started on a particular day. Now, whether April 20th or 25th, whenever this was, is reasonably close to the commencement of the conspiracy as charged, is a fact question for you. If you find that the conversation was before the conspiracy started then of course no one else can be charged with what Christian said to Rodriguez, if you credit Rodriguez' testimony. On the other hand, you may use that testimony if you credit it, on the issue of intent to determine whether, if you find that Mr. Christian did certain things, performed certain acts that would bring him into the conspiracy. You may look at that testimony concerning April 20th or 21st to determine whether when he per-

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charge on Esparza

formed the acts which would bring him into the conspiracy -- whether those acts were knowing and intentional as conspiratorial activities.

The same may be said of Hector Christian's activity on September 5th. Special Agent Alleva testified that on that day -- and I'm just going from my memory, it isn't perfect, it's rather faulty, so you use your own recollection -- that he had some negotiations with Hector Christian on some narcotics deal and it fell through, wasn't consummated.

Again, if you find the role that he played on September 5th is similar to the role he played on May 15th to May 16th, then you may use that testimony to determine whether his activity at the commencement of the conspiracy charged was with intent to participate in a cocaine deal.

I admonished you when the testimony came in and I again say to you that if with that testimony you find the Government has not proven its case against Hector Christian, then it would be improper for you, if you believe that he did negotiate on the 5th, to say, "Well, he did on the 5th, so we'll convict him on this." That would not be proper. So now by the shake of your head I can see you under-

stand the limited use of the testimony.

So too the testimony of Special Agent Guadagnino about a transaction where he started the negotiations in Union City, and came to Brooklyn in July of '69, involving a narcotics deal involving the defendant Ramando Esparza. Whatever I said about the limited use of that testimony in regard to Hector Christian is also true of the testimony concerning the transaction or negotiations with Special Agent Guadagnino some seven years, or back about seven years prior to the time of the existence of this conspiracy.

Now, if you find the conspiracy existed and you find that Louis Rodriguez knowingly and willfully entered into the conspiracy, then as a member of the conspiracy whatever he said while he was a member of the conspiracy binds any of the accused that you find knowingly and willingly had become members of the conspiracy.

However, upon his arrest, when he said that he was ready to cooperate with the government and became a government informant, as a matter of law he is not a member of the conspiracy in anything he said or did. It could not possibly bind any of the accused.

The defendant Delfin Leo Gonzales testified that

1 on May 29th he delivered a package which contained
2 cocaine to Special Agent Alleva at the request of Louis
3 Rodriguez, who was then an agent of the government.
4 He testified that he was induced to deliver the package
5 by a promise of a tip of two hundred dollars. He
6 testified that he did not know that the substance that
7 he delivered was cocaine.

8
9 Gonzales did not commit a crime in delivering the
10 package if he had no previous intent or purpose to
11 violate the law in delivering the cocaine but was induced
12 or persuaded by Rodriguez to commit the crime.

13 On the other hand, if Gonzales without any induce-
14 ment or persuasion of government agents, and on his
15 own initiative was ready and willing to deal in cocaine,
16 the mere fact that Rodriguez and/or Alleva provided the
17 opportunity to engage in the sale of the cocaine does
18 not relieve the defendant Gonzales of criminal liability.

19 In other words, if the crime were initiated, manu-
20 factured by the government then it's entrapment. But
21 if we have an individual who is ready to make the deal
22 and was just waiting for somebody to come along and
23 offer it to him, and it happened to be the government
24 agents that did, that doesn't relieve him.

25 I'm about to excuse you for deliberation on the

1
2 matter. During your deliberations you may have occasion
3 to communicate with the court. You can communicate with
4 the court through the marshals that will be assigned to
5 you. All your messages will come through your foreman.
6 Don't ask me how any particular witness testified or
7 what he said. If I told you that I would be pre-empting
8 your right to decide the facts, I would be telling you
9 what they said.

10 You may ask for the testimony of a particular
11 witness or the subject matter of a particular issue in
12 the case.

13 During your deliberations, I am not interested
14 in knowing how you stand at any particular time as
15 to any defendant. Don't tell me that you are six to
16 six or eight to four or ten to two. I am interested
17 in knowing when you have a verdict. Don't tell me what
18 the verdict is, just say "We have arrived at a verdict."

19 I will then know that you have unanimously
20 agreed on a verdict and then I will call you in, I will
21 ask the foreman to stand, and I will ask what the verdict
22 is. In effect I will say "In the case of the United
23 States against Armando Esparza, Delfin Leo Gonzales,
24 and Hector Christian, how do you find defendant Esparza to
25 count one?" and you will tell me. "How do you find

1
2 Defendant Gonzales as to count one? How you do you
3 find Defendant Hector Christian as to count one?"

4 And then I will go on to counts two and three.
5 And then I will turn to juror number 2 and ask him "Have
6 you heard the verdict as rendered by your foreman?" And
7 whether that is your verdict, and you will give me
8 your answer. And I will go down until I have twelve.

9 If I hear twelve verdicts and the verdicts are
10 unanimous then it first becomes the verdict of this
11 case, not before. It should be done in open court.

12 Now , of course, each juror must decide the case
13 for himself and herself, always based on the evidence
14 and the common sense interpretation and inferences to be
15 drawn from the evidence. Any juror who takes an arbitrary
16 view, and an intransigent view and refuses to discuss the
17 evidence with his or her fellow jurors is violating the
18 oath. The jury process is a deliberative process, it's
19 an exchange of ideas. What is his testimony, what is her
20 testimony, what did he say? That's the way to arrive at
21 a verdict.

22 It's equally a violation of one's oath to go into
23 the jury room and say "well, I don't feel like talking
24 about the case, "and" I have a reputation as a good-time
25 Charlie or a get-along Jane, and I never argue so I say
whatever you say is all right with me."

1 charge on Esparza

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2 That's not proper either. Both sides are entitled
3 to an intelligent verdict by twelve jurors, arrived at
4 after analysis and deliberation on the evidence.

5 If you first arrived at a verdict after discussing
6 it with your fellow jurors, feel that your verdict is
7 not consistent with the evidence and feel that you ought
8 to reverse yourself and that the second verdict is con-
9 sistent with the evidence, then do it. Nothing wrong
10 in that. That's what we mean by exchange of ideas and
11 deliberation. Just give it your fair, intelligent, un-
12 biased consideration.

13 Now I ask you to take leave of the courtroom.
14 Don't start your deliberations. I just want to talk to
15 the lawyers.

16 (Jury out)

17 THE COURT: Mrs. Amon, any exceptions?

18 MRS. AMON: Your honor, I'm sure it's the jury's
19 recollection on this particular point, but your Honor
20 said something about if the jury credited the testimony
21 of Louis Rodriguez with respect to the April 21st
22 conversations with respect to Hector Christian.

23 THE COURT: If they credited him.

24 MRS. AMON: Yes, but it was the testimony of
25 Agent Alleva.

1
2 THE COURT: Agent Alleva on the 21st?

3 MRS. AMON: Yes.

4 THE COURT: Oh.

5 MRS. AMON: Louis Rodriguez made some mention of
6 it, but what Louis Rodriguez said was that the con-
7 versation was mainly between Agent Alleva , and then
8 Agent Alleva testified to it.

9 MR. BELEVEDERE: Who are we discussing now? Are
10 you discussing Mr. Christian?

11 THE COURT: No, the 20th or 21st.

12 MRS. AMON: Yes, Mr. Christian on the 21st.

13 THE COURT: I now recall. I thought it was
14 Rodriguez.

15 Anything else?

16 MRS. AMON: Your honor, there is only one that
17 concerns me a little bit. There was the question of the
18 argument of withdrawal from the conspiracy. I don't
19 remember Mr. Belvedere making a specific argument about
20 the fact that he withdrew.

21 THE COURT: Oh, I think he did.

22 MR. BELVEDERE: I alluded to it.

23 MRS. AMON: He said yesterday that he was --

24 THE COURT: I thought I heard something. He said
25 he never had anything to do with this anymore after the

16th.

MR. BELVEDERE: It cut like a knife. I used --

THE COURT: Well, in effect he was saying he was out.

MR. BELVEDERE: I didn't really know how to handle it in view of the instructions, and so I alluded to it without as much as saying it.

THE COURT: Well, do you want -- I remember you wanted me to charge on that too.

MR. BELVEDERE: I asked you to.

THE COURT: I remember you asked me to. I thought it was a fact question.

MR. BELVEDERE: I remember I used the expression "cut like a knife".

MR. LAIFER: Your honor, I respectfully --

THE COURT: I want to go down the line. I want to see if Mrs. Amon has anything.

MRS. AMON: The thing is I don't recall. Your honor had said yesterday that it took an affirmative act to withdraw.

THE COURT: Well, that might have been an affirmative act.

MRS. AMON: Well --

THE COURT: Rodriguez says "You are through, I'm

1 going to talk" -- He didn't say it this way, 76Da
2 but I'm giving it the best interpretation -- " You are
3 through, I am going to the source directly, you are out,
4 don't deal, I'm going to talk to him directly. But I'll
5 see that you are taken care of."

6 (continued next page)
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MRS. AMON: No, I think the testimony was 761
that Christian was worried about the fact that --

3 THE COURT: I read it only yesterday, page 49.

4 MRS. AMON: Well, Gonzales said he could take it.

5 THE COURT: It was Rodriguez' testimony. Rod-
6 riguez says "Look, I'll take care of you, I'll deal with
7 the source myself, but don't worry about it, I'll take
8 care of you." Words to that effect.

9 MRS. AMON: Well, in recounting what Christian
10 is saying he says "I know you are going to deal directly
11 with the source, and I feel that I've been left out."

12 And Rodriguez says "No, you introduced me to Leo."

13 Well, he said "Therefore I'm going to talk to Leo
14 and make sure you are taken care of."

15 THE COURT: Yes, I thought that created a fact
16 question. I don't know, it's close.

17 MRS. AMON: I mean it's "I don't want to be left
18 out, " not that "I want to" --

19 THE COURT: Well, you can't cut it that fine.
20 Now, you know this is only testimony. It depends upon
21 what interpretation there is to it. You are now talking
22 like defense counsel, you see. "Oh, she can't say that,
23 he didn't say it."

24 MR. BELVEDERE: That's from association. It's
25 rubbing off on her, your Honor.

1 THE COURT: I don't think so. She is too new at
2 the game. It hasn't come about yet.

3 MRS. AMON: I don't know whether that was a good
4 thing or a bad.

5 THE COURT: I'm not quite sure, let me think
6 about it.

7 MRS. AMON: I'm not sure I take it that way.

8 THE COURT: Strange, in the middle of the charge
9 I thought "Oh, this aiding and abetting and conspiracy."
10 I often ask prosecutors not to put it in the same indict-
11 ment because it's one of the most confusing things I
12 tell a jury. I have more trouble with that than anything
13 else. So I thought I'd do it and get rid of it. I
14 don't know whether I made myself understood. Did it
15 sound logical to you?

16 MR. BELVEDERE: I understood, yes sir.

17 THE COURT: I have tried to figure this out over
18 the years, and I thought that's the only thing and you
19 might as well be frank about it. I know that some
20 opinions try to distinguish it, and I tell you they
21 wind up like a pretzel coming back on the same place
22 they started.

23 Mr. Belvedere, any objections?

24 MR. BELVEDERE: I have no objections.

25 THE COURT: Mr. Asen?

1 MR. ASEN: Yes, your Honor, I noted three things.

2 I would take exception to your charge on entrap-
3 ment. At the moment I don't have my copy of the previous
4 proceeding, but it was substantially different.

5 THE COURT: No, I first gave it word for word,
6 and what I added was -- and this is the way some of the
7 cases say it -- it was the crime is manufactured by the
8 government, it's their idea, they started -- and they
9 use the term manufactured -- then he doesn't commit a
10 crime, it's entrapment.

11 MR. ASEN: Well, except --

12 THE COURT: On the other hand, if he has a pre-
13 disposition to commit the crime, if he is ready and just
14 awaiting the opportunity, the mere fact the government
15 gives him the opportunity is not entrapment.

16 MR. ASEN: Well, I would take exception to your
17 Honor's charge -- it's not -- unfortunately I don't have
18 my copy of the previous proceeding before you or I would
19 go over it with you --

20 THE COURT: I'm telling you that I read --

21 MR. ASEN: My understanding of the law as far as
22 entrapment, at least insofar as this case is concerned,
23 is that here you have the government by my contention
24 providing the very cocaine that is the issue in the case.
25 Now, it can be argued -- and your Honor would be I suppose

1 proper to say that if you find that Gonzales was other-
2 wise predisposed, but I think the tone and the inference
3 to be drawn by the last statement of your Honor's charge
4 was substantially different than in that last trial, and
5 I noted that, and I would take exception to that.

6 Additionally, your Honor --

7 THE COURT: I've got the same page. I thought I
8 read this part too. This is the only time I picked up
9 my paper. Here it is.

10 That's what I said the last time, unless I didn't
11 read it the last time.

12 MR. ASEN: You did not read this the last time,
13 as far as I know. I gave my copy to the reporter who
14 was here before.

15 THE COURT: Well, look at it.

16 MR. ASEN: Well, I take exception to that charge.
17 But I would have hoped that your Honor would have charged
18 -- would be substantially --

19 THE COURT: But you asked me -- Wait, now, you
20 asked me to charge as I did in the last trial.

21 MR. ASEN: That's correct.

22 THE COURT: Now, if I charge in accordance with
23 your request you can't come now and say "I don't like
24 it."

25 MR. ASEN: I asked your Honor to charge entrapment--

1 THE COURT: Find it, please. Find it.

2 MR. ASEN: All right. In the meantime, I'd like
3 to ask your Honor to charge that the testimony of law
4 enforcement agents is not entitled to greater weight
5 than the testimony of other witnesses, which your Honor
6 did not charge.

7 THE COURT: I didn't say they were entitled to
8 greater weight.

9 MR. ASEN: I'm not saying that your Honor did,
10 I'm saying that there is a specific charge when you
11 have witnesses that are law enforcement agents.

12 THE COURT: Did you make that request, Mr. Asen?
13 Did you make that request to me?

14 MR. ASEN: Prior to your Honor's charge?

15 THE COURT: Yes.

16 MR. ASEN: No I did not. I'm requesting --

17 THE COURT: Why do you make it now? I didn't
18 give it the last time.

19 MR. ASEN: I'm giving it now -- I'm requesting
20 that your Honor charge it now. I suppose that I'm
21 overly dilatory at this point, I'm not taking exception
22 to your Honor's charge, I'm asking your Honor to charge
23 it now.

24 THE COURT: I'll do it just to avoid any possible
25 point on appeal, but I think it's dirty pool.

1 MR. ASEN: Well, I believe that I would have
2 expected your Honor to have charged it. I didn't
3 anticipate --

4 THE COURT: I didn't charge it the first time,
5 and you asked me to give the same charge. You never
6 requested it. And this is the first time you are asking
7 for it. So don't tell me you thought. You didn't think.

8 MR. ASEN: Very well, your Honor, but I'm asking
9 your Honor to charge it at this time.

10 Now, your Honor twice mentioned my client's name
11 in reference to a John Doe. I believe that was inad-
12 vertent, but I think the record should so reflect that
13 I would take exception to that.

14 THE COURT: What do you want me to do about it?

15 MR. ASEN: Well, I'm stating --

16 THE COURT: I assume you will take my word for
17 it that it was inadvertance, won't you, Mr. Asen?

18 MR. ASEN: I stated that right at the beginning
19 of my statement, your Honor.

20 If your honor would give me a moment I will --

21 THE COURT: It wasn't in the same order the
22 first time.

23 MR. ASEN: That's why I'm a little --

24 MRS. AMON: There you go.

25 MR. ASEN: Would your Honor want me to read it

1 into the record?

2 THE COURT: Yes, I want you to read it into the
3 record. Go ahead.

4 MR. ASEN: Okay, this is page 779 of your Honor's
5 charge at the prior proceeding:

6 "If you believe the testimony given by Gonzales
7 that he delivered the package only because Louis
8 Rodriguez told him to do it, and that he was getting
9 dollars 200 for it, then he was acting at the direction
10 of a government agent. That is the significant part
11 of it. If that is what happened then Gonzales did not
12 commit a crime in delivering the package, that is, if
13 he had no previous intent or purpose to violate the
14 law in delivering the cocaine but was induced or pur-
15 suaded by Rodriguez to commit the crime.

16 On the other hand if Gonzales without the induce-
17 ment or persuasion of government agents and on his
18 own initiative was ready, willing to deal in cocaine,
19 to deliver this package knowing that it was cocaine, the
20 mere fact that Rodriguez and/or Alleva provided the
21 opportunity to engage in the sale does not afford
22 Gonzales a defense to the charge."

23 Which was your Honor's previous charge. Now,
24 your Honor included something about manufacturing the
25 crime.

1 THE COURT: I told you I added that. I thought
2 it was better to explain it, yes. I don't see how you
3 are prejudiced by it.

4 MR. ASEN: Well, your Honor, my point is that the
5 emphasis to be drawn by your Honor's previous charge is
6 where your Honor states that that is the significant
7 part of it.

8 THE COURT: What's the next point? I'll just
9 overrule the objection, and you have your exception on
10 the record.

11 Next?

12 MR. ASEN: Very well, your Honor, that's all.

13 THE COURT: All right, call them in.

14 Oh, Mr. Laifer?

15 MR. LAIFER: I have no exceptions, your Honor,
16 except for one point: I understood yesterday that you
17 were not going to charge withdrawal from the conspiracy,
18 and that --

19 THE COURT: I had to do it.

20 MR. LAIFER: Yes, but Judge, yesterday, when you
21 did that -- it's so antagonistic to the defense.

22 THE COURT: I said I wouldn't charge withdrawal.

23 MR. LAIFER: Yes.

24 THE COURT: Not as a matter of law.

25 MR. LAIFER: Yes, Judge.

1 THE COURT: But I specifically said it's a fact
2 question, I'll give it to the jury.

3 MR. LAIFER: Judge, I can only urge this on the
4 court: that defense is so antagonistic to the defense
5 of the two other defendants in this case, either saying
6 "Look, there was a conspiracy, but I left," would you
7 in some way clear that up for the jury?

8 THE COURT: No, I won't do anything further. I
9 can't be unfair to the defendant because you think it
10 might be prejudicial.

11 I'll tell you how I try every case of multiple
12 defendants: everytime some lawyer says "Gee, I don't
13 want his request." or "I object to his question," when
14 they are questioning, or what he says in summation, I
15 say, "Wait, if I were trying Mr. Hector Christian alone
16 would I allow it, would I do it?" If the answer is yes,
17 then he's allowed to do it in a multiple case.

18 Frankly, in this I don't understand how possibly
19 the withdrawal, saying it's a fact question, how the
20 withdrawal, giving the issue of withdrawal to the jury,
21 can possibly affect Esparza. You mean he looks like
22 someone playing a lesser role?

23 Well, the fact is, that's the way the case is
24 presented.

25 MR. LAIFER: No, no.
(continued next page)

THE COURT: Christian had the lesser role here.

MR. LAIFER: That's not what I'm saying, Judge.

I'm saying that what was said is that Christian indicates by his counsel that he withdrew from the conspiracy on or about the 16th, giving credence to the fact that in fact there was a conspiracy.

THE COURT: If that is the way you interpret it.

MR. LAIFER: I would urge this on your Honor.

THE COURT: I think it's pretty sad because that is not the way I heard it. I heard it, assuming there was a conspiracy.

I did not hear Mr. Belvedere acknowledge that there was a conspiracy and that he was a member of it.

MR. BELVEDERE: I never said that, your Honor. I never even used the word "conspiracy" in that context at that time.

THE COURT: Of course not.

MR. LAIFER: All right. Thank you, Judge, I have no other exceptions.

THE COURT: Seat the jury.

MR. BELVEDERE: I think the exact words were "He disappeared".

THE COURT: Yes.

(The following occurred in the presence of the

1 jury)

2 THE COURT: All witnesses are judged by the same
3 standards: Rodreguez, the defendant Gonzales, the law
4 enforcement officers. Law enforcement officers
5 testimony is not more credible because they are law
6 enforcement officers nor does their testimony get any
7 extra weight just because they are law enforcement officers.
8 I charged you that before, and of course that charge is
9 as correct now as it was then.

10 Mr. Alber, you are excused, thank you. Alternates
11 may not participate in the deliberation of the jury.

12 Will you please take whatever personal belongings
13 you have?

14 Alternate JUROR NUMBER ONE: Sure, okay.

15 THE COURT: Would the clerk please swear in the
16 marshals?

17 (Male marshal duly sworn by clerk of court).

18 THE COURT: The jury is excused for deliberation
19 on the matter.

20 I just want to call your attention to the oath
21 you took, to render a true and just verdict, and that
22 means a verdict on the evidence, free of all bias,
23 prejudice, and sympathy.

24 The jury is excused for deliberation on the
25 matter.

1 (The following occurred in the absence
2 of the jury at 3:45 p.m.)

3 MRS. AMON: Your honor, you weren't going to say
4 anything about April 23rd? I didn't want to interrupt
5 you , but I didn't know what to do.

6 THE COURT: I forgot. Do you want to bring them
7 back? Will everybody stay in the courtroom, please?
8 Bring them back.

9 I had it, but I drew a line under it so I just
10 paid attention to Mr. Asen. He gets special attention
11 here.

12 MR. ASEN: I certainly didn't request it. I seem
13 to be getting it.

14 THE COURT: Yes, you will get it. You will get
15 it.

16 (Jury present)

17 THE COURT: There was another error that was
18 called to my attention. I referred to the testimony
19 of Louis Rodriguez regarding a conversation he said he
20 had with Hector Christian on April 20th and 21st.

21 I now recall that it was Special Agent Alleva
22 who gave the testimony, and Louis Rodriguez said he
23 was present and said something about he did most of
24 the translation at the time.

25 I also failed to tell you how to use this

charge on Esperanza

memorandum of verdict. I just said that it was an unofficial document.

Well, frankly, use it any way you want to. You can use it for scrap paper, if you want to. Use it to make a memo of how you are voting.

Maybe we will give the foreman just one extra. I would like him to sign one copy for me when he comes in with the verdict, and you can just doodle on the other, make notes on the other.

All right?

MRS. AMON: Your honor, may I approach the bench before the jury is excused?

THE COURT: Will you come to the side-bar, please?

(Side-bar follows)

MRS. AMON: I just want to clarify a small point. You made a statement about Mr. Rodriguez doing the translating. Hector Christian speaks English. There was no question of --

(In open court)

THE COURT: Oh, I compounded the error. That was not the time that Louis Rodriguez did the translating because he testified at another time he translated for Gonzales, but, of course, Hector Christian, he indicated, spoke English.

charge on Esperanza
Does that rectify all my errors so far?

All right, I think it does.

Anything else? Anything else, anybody?

All right. As I was saying, I would like the
foreman to have another copy of the memorandum of
verdict. I would like that to be completed by the fore-
man and signed and delivered. The others can just use
it for just memo paper, do whatever you want with it.

The jury is excused for deliberation on the
matter.

(The following occurred in the absence of the
jury.)

THE COURT: All right.

(Recess taken)

(Continued next page)

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speranza 3

(The following occurred in the absence
of the jury at 4:30 p.m.)

THE COURT: All right.

THE CLERK: Note from jury, marked Court's

Exhibit 2.

(So marked.)

THE COURT: Do we all agree on this page citation?

MR. BELVEDERE: Yes sir.

THE COURT: Seat the jury.

(The jury present.)

THE COURT: Your note says, "May we have
Rodriguez's testimony concerning the San Rafael social
club." Page 59, line 2, cross-examination by Mr.
Laifer.

(RECORD read, as indicated by court.)

THE COURT: I suspend on line 9 at page 60.

I'd go to page 94 and I think this is still the
cross-examination by Mr. Laifer.

MR. ASEN: Excuse me, your Honor. May the record
reflect that in the absence of the official court
interpreter, that I have asked Mr. Belvedere to sub-
stitute and interpret on behalf of my client for
these proceedings.

THE COURT: All right.

MR. ASEN: But that I would ask that the

1 interpreter be notified in the future, should the jury
2 have any further questions.

3 THE COURT: Thank you.

4 MR. ASEN: Thank you, your Honor.

5 THE COURT: It looks as if it's Mr. Laifer's
6 cross-examination at page 94.

7 (RECORD read as indicated by court.)

8 THE COURT: I will suspend at line 20 on page 94
9 and I will go to line 24 on page 94.

10 (RECORD read as indicated by court.)

11 THE COURT: I suspend at line 9 on page 95.

12 I go to page 130, line 2, continued cross
13 examination.

14 (RECORD read as indicated by court.)

15 THE COURT: I suspend at line 22. That is all
16 the testimony of Mr. Rodriguez, the lawyers tell me,
17 that relates to the San Rafael social club.

18 The jury is excused.

19 (The following occurred in the absence of the
20 jury.)

21 MR. LAIFER: Are we excused, your Honor?

22 THE COURT: Yes.

23 MR. LAIFER: Thank you.

24 (RECESS taken)

25 (The following occurred in the absence of

1 the jury at 4:50 p.m.)

2 THE COURT: The note asked for the following
3 Exhibits. May I have the note, please?

4 THE CLERK: Yes sir. It is marked Court's
5 Exhibit Number 3 for identification.

6 (So marked)

7 THE COURT: Address book, cocain, slip of paper
8 from Rodriguez.

9 The lawyers agree that the cocain should not go
10 into the jury room. I think if I just hand it to them
11 here they would quickly return it.

12 MRS. AMON: There is a question about the slip
13 of paper from Rodriguez.

14 THE COURT: The slip of paper can only mean the
15 cards.

16 MRS. AMON: I think so.

17 MR. BELVEDERE: That's all we think it is. If
18 it is anything else, they can ask for it.

19 THE COURT: Yes.

20 Ask the jurors to come in.

21 (Jury present.)

22 THE COURT: You asked for the address book and
23 cocain and slips of paper that Rodriguez gave. I
24 assume you mean the business cards?

25 JUROR NUMBER ONE: The one that he took out of

1 his pocket during the testimony.

2 THE COURT: Oh.

3 JUROR NUMBER ONE: When they were asking about
4 notes.

5 THE COURT: That was marked for identification.
6 It was never placed into evidence. I think the lawyers
7 agreed that it had nothing to do with the case.

8 MR. BELVEDERE: Sir, may It?

9 THE COURT: The jury is excused.

10 (The following occurred in the absence of the
11 jury.)

12 MR. BELVEDERE: There were two pieces of paper.
13 I think your Honor -- okay, now?

14 I think, your Honor, there are two pieces. The
15 first piece he took out was an advertisement -- for
16 placing an advertisement in a newspaper in Spanish.
17 That we agreed.

18 THE COURT: Yes.

19 MR. BELVEDERE: He took out another little yellow
20 sheet during cross-examination on which he had written
21 certain notes which he had used to refresh his memory.

22 MRS. AMON: That was never offered into evidence,
23 that sheet.

24 MR. LAIPER: Never was.

25 MRS. AMON: It wasn't.

1 MR. BELVEDERE: If it wasn't, I withdraw it.

2 MR. ASEN: It was simply marked for identification
3 and at the end of the day, I recall, that we returned
4 it to --

5 MRS. AMON: It was nothing, no cross-examination
6 or anything else about it.

7 MR. BELVEDERE: Fine.

8 THE COURT: Seat the jury.

9 MR. BELVEDERE: So long as we know there were
10 two sheets.

11 (Jury present.)

12 THE COURT: When an exhibit is marked only for
13 identification, it is not part of the record, so you
14 may not see it.

15 JUROR NUMBER ONE: Okay.

16 THE COURT: Now, the cocain, if you would like
17 to examine it, you may examine it in the courtroom.
18 I never send narcotics into the jury room. There is a
19 certain danger in the package opening, and so forth,
20 but if you would like to look at the package here and
21 pass it around, you may do that.

22 (Exhibit being passed among jurors.)

23 THE COURT: I might tell you something about
24 the time schedule. Usually juries deliberate until
25 approximately 6:30, 7:00. I do not send juries out

1 to dinner only because it takes so much time that by
2 the time you get back it is time to suspend.

3 So that when you have decided that you have
4 had enough for the day, we will disband and I will
5 ask you to return tomorrow morning. Just in case
6 that comes to mind.

7 All right. The jury is excused for the
8 deliberation on the matter.

9 The Marshall is directed to turn the brown
10 book over, Exhibit 7. Turn it over to the jury.

11 (The following occurred in the absence of
12 the jury.)

13 THE COURT: All right.

14 (Recess taken)

15 (continued next page)
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R:nh

5/3

XXXXX
Esparza

(The following occurred in the absence of
the jury at 5:20 p.m.)

THE COURT: All right. Seat the jury.

THE CLERK: Jury note, marked as Court's Exhibit
4 for identification.

(So marked)

(Jury present)

THE COURT: I have your note marked Court's
Exhibit 4. "We won't be able to reach any decision
tonight and the ladies do not like to go home after
dark. May we be excused until tomorrow?"

Well, if that is your decision, then we will
suspend.

It is very important that at this particular
point that you not discuss the case with anyone. You
probably are more susceptible to suggestion at this
point than at any time during the trial. So you must
so discipline yourself so that you just refuse to dis-
cuss with any of the folks at home and when you return
tomorrow do not discuss it until I call you back into
the courtroom and make certain everyone is here and then
when I find you all here, then I will excuse you for
deliberation on the matter.

It is as if between now and the time you commence
deliberation there were no break in your talks or your

1 thinking.

2 It would be improper if five or ten or even
3 eleven of the jurors in the jury room and started
4 discussing the case. The case can only be discussed
5 when all twelve are present.

6 So I want to make sure that all twelve are
7 present. So when you come in tomorrow -- and we will
8 start promptly at 10 -- do not talk about the case.
9 I will call you into the courtroom and then I will
10 excuse you and ask you to continue deliberations.

11 Tomorrow you will again find a menu and a slip
12 and we will order lunch in for you.

13 It is vital that every juror come in tomorrow.
14 If one juror misses court tomorrow, we cannot proceed.
15 So if any of you are thinking of getting the flu,
16 please wait until the case is over. That may sound
17 selfish to you, but if anyone does get sick, it means
18 I will have to declare a mistrial and the case will
19 have to be tried all over again.

20 So I am as interested in your health at this
21 point as your respective spouses and children and your
22 friends. I will breathe a sigh of relief tomorrow when
23 I see all twelve here and ready to continue. I mean
24 that very seriously.

25 The jury is excused. Please remember what I

1 said and I will look forward to seeing you tomorrow
2 very eagerly. The jury is excused.

3 (The following occurred in the absence of
4 the jury.)

5 THE COURT: I want everyone to remain in the
6 courtroom for at least five minutes, until the jurors
7 have left the building.

8 See that no one leaves the courtroom.

9 THE CLERK: Yes sir.

10 THE COURT: Except Judge Costa, who is sitting
11 in the back there.

12 (Whereupon, the recess was taken until
13 February 27, 1976 at 10:00 a.m.)
14 end of day * * * * *

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THOMAS J. COSTA, U.S. District Court
U.S. District Court

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT ED NY
★ MAR 1 1976 ★

3
4
5 UNITED STATES OF AMERICA, :

6 -against- :

7 ARMANDO ESPARZA, DELFIN :
8 "LEO" GONZALEZ, HECTOR :
9 CHRISTIAN, :

10 Defendants. :

75-CR-772

TIME A.M.
P.M.

11 United States Courthouse
12 Brooklyn, New York

13 February 27, 1976

14 10:00 o'clock A.M.

15
16 B e f o r e :

17 HONORABLE JACOB MISHLER, Chief U.S.D.J.

18
19 I hereby certify that the foregoing is
20 a true and accurate transcript from my
21 stenographic notes in this proceeding.

22 *Perry Quenbach*

23 Official Court Reporter
24 U. S. District Court

25 GENE RUDOLPH
OFFICIAL COURT REPORTER

1
2 **Appearances:**

3
4 DAVID G. TRAGER, ESQ.
5 United States Attorney
6 for the Eastern District of New York

7
8 BY: CAROL AMON, ESQ.
9 Assistant U.S. Attorney

10
11 STEPHEN R. LAIPER, ESQ.
12 Attorney for Defendant Esparza

13
14 MICHAEL ASEN, ESQ.
15 Attorney for Defendant Gonzalez

16
17 JOSEPH L. BELVEDERE, ESQ.
18 Attorney for Defendant Christian
19
20
21
22
23
24
25

1
2 THE CLERK: All rise.

3 Be seated.

4 THE COURT: All the defendants and lawyers are
5 here. We have two interpreters today; right?

6 MS. AMON: I brought Mr. Boyne for Mr. Sandoval.

7 THE COURT: All right, please seat the jury.

8 (The jury entered the courtroom at 10:00 o'clock.)

9 THE COURT: Good morning, ladies and gentlemen.
10 I am very happy to see we are all here. The jury is
11 excused for deliberation on the matter before it.

12 (The jury left the courtroom at 10:03.)

13 (Whereupon, a recess was taken.)

14 THE CLERK: Jury note marked Court's Exhibit 5
15 for identification.

16 Be seated, please.

17 THE COURT: The jury wants me to read count 3,
18 and then define what distribution is. They want me to
19 read count 3 in its entirety and redefine distribution.
20 I intend to say distribution meant the sale or delivery
21 to others. Any objection to that?

22 MR. LAIFER: No objection.

23 THE COURT: I don't know how else to define it.

24 Seat the jury.

25 MR. ASEN: Your Honor, is your Honor just going

1 to say the selling or the knowing and intentional
2 selling?

3 THE COURT: They just want to know what
4 distribution is.

5 MR. ASEN: I just wanted to understand.

6 THE COURT: They are not asking about criminal
7 intent, just the act of distribution.

8 MR. ASEN: Distribution?

9 THE COURT: That is all they are asking.

10 Seat the jury.

11 (Whereupon, the jury entered the courtroom at
12 eleven o'clock.)

13 THE COURT: There is a note here asking that
14 I read count 3 in its entirety and redefine distribution.
15 Count 3 reads:

16 "On or about the 29th day of May, 1969, within
17 the Eastern District of New York, the defendants
18 Armando Esparza and John Doe, also known as 'Leo
19 Gonzalez' did knowingly and intentionally distribute
20 approximately 115 grams of cocaine, a Schedule II
21 narcotic drug controlled substance. (Title 21, United
22 States Code Section 841 (a)(1) and Title 18, United
23 States Code Section 2.

24 Now you ask that I define distribution. You
25 are not asking for the other elements of the crime as

1 I understand it, you just want to know what distribution
2 is. Distribution is the sale or delivery to another
3 of the substance. The jury is excused for further
4 deliberation.

5 THE FOREMAN: May we ask a question?

6 THE COURT: I would rather you write it out.
7 Does it refer to distribution?

8 THE FOREMAN: Yes.

9 THE COURT: What is it?

10 THE FOREMAN: Is there more than one type of
11 distribution?

12 THE COURT: You want to distinguish possession
13 and distribution?

14 JUROR NO. 11: As far as its entirety.

15 THE COURT: I think I know what you are confused
16 about. Count 2 charges the defendant with possession
17 with intent to distribute. Now, that is one crime
18 charged. In other words, the Government must prove in
19 addition to the proof of the criminal intent, that the
20 defendant knew what he had was a narcotic, cocaine.
21 And that secondly, that he possessed not for himself,
22 not for his own use, but he possessed it intending to
23 distribute it to someone else to give it, to deliver it,
24 to sell to someone else. That is one crime. That is
25 count 2.

1 Count 3 charges another specific crime. In other
2 words, one can be charged with the possession with intent
3 to distribute before the actual distribution. That is
4 one crime.

5 Count 3 charges the actual distribution, the
6 delivery in this case, the sale to special agent Alleva.
7 That is the act of distribution charged in this count.
8 I hope that clarifies it. If it doesn't, then send me
9 another note and I will try again.

10 (The jury left the courtroom at 11:05.)

11 THE COURT: Is there any objection to
12 supplemental charge?

13 MS. AMON: No, your Honor. I think I understand
14 what the jury was asking or what the problem was. In
15 count 3 obviously both Delfin Leo Gonzalez and Armando
16 Esparza are charged with the actual distribution. Now,
17 when your Honor gave a charge about actual distribution,
18 I think they needed the aiding and abetting charge,
19 constructive possession, so they are wondering how it
20 can be charged with the distribution.

21 MR. LAIFER: I don't know that that calls for
22 the working of their minds.

23 MS. AMON: That was the question, two types of
24 possession and are there two types of distribution?
25

1 THE COURT: Call them back. That may very well
2 be the intent. Call them. Do you agree that that was
3 it?

4 MR. LAIPER: Yes.

5 MR. ASEN: I wasn't listening to what you were
6 saying.

7 THE COURT: All right, call the jury back. I
8 will find out whether that was what they were talking
9 abc

10 (Whereupon, the jury entered the courtroom at
11 11:03.)

12 THE COURT: There was a look of puzzlement on
13 your face and one of the lawyers suggested what you
14 were really asking was whether Armando Esparza was
15 charged with the actual distribution, the delivery or
16 whether he was charged as an aider and abettor and, it
17 was pointed out to me that when I charged on aiding and
18 abetting I only charged on the possession count, on
19 count 2. I did not relate aiding and abetting to
20 count 3. Is that what is puzzling you?

21 Anybody? I see the juror that asked the question,
22 Mr. Roberts asked whether there was two kinds of
23 distribution. When I charged on the aiding and abetting
24 count, and I'd better use the exact language of the
25 section, it not only referred to the possession count,

1 but it also referred to the count 3. Now, that section
2 of Title 18 --

3 JUROR NO. 11: Excuse me, your Honor, you gave
4 the layman's language and, what is possession, holding
5 a glass in your office? Does that also apply in the
6 distribution that is before us?

7 THE COURT: Possession is one concept. That is
8 having what we call dominion and control over the
9 substance. That is one count. I know it may be
10 difficult for a juror to conceive as to how you can
11 distribute without having it in possession. I can't
12 fault you for finding that a little confusing, but you
13 must think of the charges here. The charge is in
14 count 2 that first he possessed it with intent to
15 distribute. The actual distribution does not have to
16 take place in order to complete the crime charged.
17 It is true that one may also have possession and be
18 charged with the distribution of the substance he
19 possesses, but the charge is that he parted with
20 possession, he delivered it, he sold it. There is no
21 inconsistency in the charges. It is true that the
22 Government charges that it was one transaction. That
23 it was possessed by Gonzalez with intent to distribute,
24 and that it was then delivered by Gonzalez to Alleva,
25 but out of that transaction the Government charges two

1 separate crimes. So that distribution is not possession
2 though it is difficult to conceive of someone delivering
3 without having it in hand. But that is not inconsistent
4 with the charge that it was distributed.

5 Now, again, I can't answer questions because you
6 see what will happen is we will get into a broad
7 discussion, and I want to avoid that. I want you to
8 think about the questions you want to ask and then
9 write them out. Now, when I tell you this is the
10 Government position, again I have no opinion one way or
11 the other as to whether it's supported by the evidence.
12 That is for you. When I recite the Government position,
13 it is only because I want to explain the problem that I
14 think you have with it, and no other reason. So if you
15 have any further questions on the definition of possession
16 and distribution, then write the questions out and I
17 will try to redefine the definition.

18 All right.

19 (Whereupon, the jury left the courtroom at
20 11:10 A.M.)

21 MR. LAIFER: Judge, I think you missed what they
22 wanted in this regard. I think they wanted to know
23 whether or not Esparta can be charged with the
24 distribution even though he did not actually distribute.

25 THE COURT: Well, you know I offered that and

1 then somebody interrupted and I stopped it. I 793
2 didn't give them what they didn't want. That is the way
3 I got it. I thought when Mrs. Amon said so that it
4 seemed to make sense, but Juror No. 11 wanted to know
5 how you can be charged with distribution when you
6 talked about actual possession, and the constructive
7 possession.

8 MR. ASEN: It is as if there would be a
9 constructive distribution.

10 MS. AMON: I think it is concluded that there is
11 a constructive distribution in the same way there is a
12 constructive possession.

13 THE COURT: I will call them back. I am
14 reluctant to ask questions in open court because you
15 know --

16 MR. LAIFER: I would rather leave it alone.

17 THE COURT: I think we ought to leave it alone.
18 I mean if they write another question, I will answer
19 it. If they file further clarification, they will
20 tell me. It is dangerous to discuss it with the jury.

21 MS. AMON: What I see happening, your Honor, is
22 they don't see how Esparza could be charged with the
23 distribution.

24 THE COURT: Then they will tell me that in the
25 question. That will be the question.

1 MR. LAIPER: I get an opposite impression. I
2 didnt' like the question.

3 THE COURT: You didn't like the questions?

4 MR. LAIPER: I didn't like the questions. But
5 c'est la vie.

6 THE COURT: I tried to understand them, and I
7 thought I did, and I thought I didn't, and after
8 Juror No. 11 asked the question again, I thought I did.

9 MS. AMON: My impression of this witness was not
10 that he had a problem with possession with intent to
11 distribute as distinguished from actual distribution.
12 I don't think they had a problem with that at all. I
13 think the problem was, you talked to them about
14 constructive possession. Under two theories, actually,
15 you can say that Esparza had possession. You could use
16 the constructive. Title 2 was aiding and abetting.
17 Their problem is they come down and they see the
18 third count, and they are saying -- I don't think they
19 understand Title 2 at all, and now saying whether
20 there is any constructive distribution.

21 THE COURT: I stopped short of charging them on
22 aiding and abetting, and I asked them if that is what
23 they are talking about, and I said Esparza could be
24 charged referring to -- and then Juror No. 11
25 interrupted me and said, "No." He seemed to be

1 indicating difficulty with the type of possession with
2 intent to distribute, and distribution really applies
3 to possession.

4 MR. LAIPER: That's really one of the easiest
5 concepts in the case.

6 THE COURT: I think so. It shows you how far
7 they have gone.

8 MR. BELVEDERE: They could be starting backwards,
9 Judge.

10 MR. ASEN: Your Honor, may I be excused for a
11 fairly short period of time? I have to appear
12 before the Magistrate.

13 THE COURT: Let me ask you this: Suppose we have
14 a note? Will you be down at the Magistrate's?

15 MR. ASEN: Shouldn't take too long.

16 THE COURT: Because the notes are coming pretty
17 fast.

18 THE CLERK: All rise.

19 (Whereupon, the Judge left the courtroom.)

20 (Time noted: 11:15 A.M.)

21 (Whereupon, a luncheon recess was taken from
22 12:00 to 1:00 p.m.)

AFTERNOON SESSION

THE CLERK: All rise..

THE COURT: Gentlemen and ladies, we have a verdict. Will you please seat the jury?

THE CLERK: Note from the jury marked Court's Exhibit 6 for identification.

(Whereupon, the jury entered the courtroom.)

THE COURT: Mr. Foreman, would you please stand? I have your note saying the jury has reached a verdict. The United States of America v. Armando Esparza, Delfin Leo Gonzalez, and Hector Christian.

As to count 1, how do you find the defendant Armando Esparza, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: How do you find the defendant Delfin Leo Gonzalez, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: As to the defendant Hector Christian, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: As to count 2, how do you find the defendant Armando Esparza, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: How do you find the defendant Delfin

1 Leo Gonzalez, guilty or not guilty?

2 THE FOREMAN: Guilty.

3 THE COURT: On count 3, how do you find the
4 defendant Armando Esparza, guilty or not guilty?

5 THE FOREMAN: Guilty.

6 THE COURT: How do you find the defendant Delfin
7 Leo Gonzalez, guilty or not guilty?

8 THE FOREMAN: Guilty.

9 THE COURT: Juror No. 2, is that your verdict?

10 JUROR NO. 2: Yes.

11 THE COURT: Juror No. 3, is that your verdict?

12 JUROR NO. 3: Yes.

13 THE COURT: Juror No. 4, is that your verdict?

14 JUROR NO. 4: Yes.

15 THE COURT: Juror No. 5, is that your verdict?

16 JUROR NO. 5: Yes.

17 THE COURT: Juror No. 6, is that your verdict?

18 JUROR NO. 6: Yes.

19 THE COURT: Juror No. 7, is that your verdict?

20 JUROR NO. 7: Yes.

21 THE COURT: Juror No. 8, is that your verdict?

22 JUROR NO. 8: Yes.

23 THE COURT: Juror No. 9, is that your verdict?

24 JUROR NO. 9: Yes.

25 THE COURT: Juror No. 10, is that your verdict?

1 JUROR NO. 10: Yes.

2 THE COURT: Juror No. 11, is that your verdict?

3 JUROR NO. 11: Yes.

4 THE COURT: Juror No. 12, is that your verdict?

5 JUROR NO. 12: Yes.

6 THE COURT: And so say you all.

7 Are there any motions directed to the verdict
8 before I excuse the jury?

9 MR. LAIPER: On behalf of my client, Armando
10 Esparza, I wish to thank them for their endeavors.

11 MR. BELVEDERE: I, too, would also like to thank
12 the jury.

13 THE COURT: It is very gracious for the
14 defendants' counsel to thank the jury for their interest
15 because they recognize and I recognize that you did the
16 kind of job that we have come to expect of juries in
17 this district; sincere effort to find a true and just
18 verdict. You might be interested to know that this is
19 a re-trial. I can tell you now. We didn't want to
20 tell you before. The case was tried before. When there
21 is a mistrial, a jury can't agree, I just declare a
22 mistrial and set it down for trial again, but I under-
23 stand that in that jury, 11 out of the 12 jurors arrived
24 at a guilty verdict soon after I gave it to them for
25

1216 LAIFER, STEPHEN USA . Esparza

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)


ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 1 day of July 1977 deponent served the within Appendix upon: _____

U.S. Atty., Eastern Dist. of N.Y.

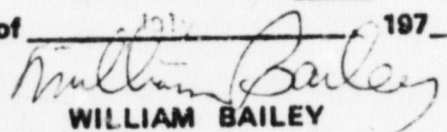
attorney(s) for
Appellee

in this action, at
225 Cadman Plaza East, Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Robert Bailey

Sworn to before me, this 12
day of July 1977.


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977